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## DE RE MILITARI ET BELLO TRACTATUS

BY PIERINO BELLI

Vol. I. A Photographic Reproduction of the Edition of 1563, with an Introduction by Arrigo Cavaglieri, and a Photograph of a Portrait of Belli.

Vol. II. A Translation of the Text, by Herbert C. Nutting, with a Translation of the Introduction, and Indexes.

*This volume with Volume I constitutes No. 18 of 'The Classics of International Law'. A list of the numbers already published is given at the end of this volume.*

# A TREATISE ON MILITARY MATTERS AND WARFARE

*IN ELEVEN PARTS*

BY

PIERINO BELLI

---

VOLUME TWO

THE TRANSLATION

By HERBERT C. NUTTING, PH.D.

*Late Professor of Latin, University of California*

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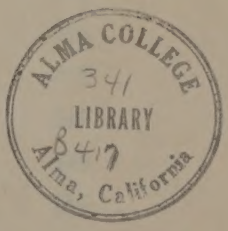


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# INTRODUCTION

BY ARRIGO CAVAGLIERI

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TRANSLATION

# INTRODUCTION

1. According to the biography published in 1783 by Baron Vernazza di Ferney, a fellow-citizen of Belli, the latter was born March 20, 1502, in the little city of Alba in Piedmont. His family, moreover, was of Alban descent and belonged to the nobility. Little is known of Belli's youth and studies. It seems probable, however, that he perfected himself in the study of jurisprudence at the University of Perugia, where at that time many students assembled, even from abroad, and the memory still lived of two great masters who taught there: Bartolus of Sassoferrato and his pupil Baldus. Alberico Gentili, in his *Laudes Academiae Perusinae* (Hanoviae, 1605), mentions Belli, who himself in a Latin discourse published after his death cites Filippo Decio and Carlo Ruino, professors of law at Perugia, referring to each by the title *dominus meus*, an expression which he probably used to signify *maestro*.

In 1535, when thirty-three years of age, he was named military auditor in the armies of the Emperor Charles V, to whom he rendered important services. When Philip II succeeded his father, he not only kept Belli in his service, but promoted him to the grade of counsellor of war, assigning to him a life stipend of four hundred crowns, a sum so considerable for those days that Belli calls the King *omnium regum qui sunt munificentissimus*. In this capacity he served under the orders of Cardinal Madruzzi, the Marquis of Pescara, and the Duke of Sessa.

By the Treaty of Cateau Cambrésis in 1559 Emmanuel Philibert, Duke of Savoy, recovered from France his hereditary dominions, and in 1561 among his new counsellors of state he chose Belli, who held that office until his death. Employed by his prince in the highest offices of state, Belli was called upon particularly to give opinions on legal questions of great importance.

The interests of Emmanuel Philibert were entrusted to him in a parley at Lyons with envoys of the King of France, from whom restitution of the five forts of Piedmont was sought; and he discharged his mission so successfully as to merit the highest praise from his prince, as is shown by a diploma which the latter issued praising Belli for having proved himself devoted and faithful, 'more so in adversity than in times of prosperity'.

Nor did he show less judgement, prudence, and loyalty in the matter of the kingdom of Cyprus. When Solyman invited Emmanuel Philibert to recover that kingdom, of which he possessed the hereditary title, the latter, wishing to confer with his counsellors, called them together. Most of them, desirous of flattering the vanity of their

prince, were disposed to accept the proposal. Belli, on the contrary, intrepidly argued the opposite opinion and caused it to prevail, showing himself, as Vernazza says, 'as circumspect in statecraft as he was rigorous and tenacious in those religious maxims which he had already expounded in his books and which gave Osasco occasion to laud him as a most eminent and prudent jurist'. The ideas of Belli on the subject are set forth in detail in Part II, chapter xvii, of his work *De Re Militari et de Bello*: '*An Christiano Regi liceat auxilio uti infidelis Principis*'.

Another important commission entrusted to Belli by Emmanuel Philibert was in connexion with the disagreement between the Duke of Ferrara and the people of Florence, Modena, and Lucca regarding the boundaries of their respective territories. This dispute had lasted for centuries, and those agreements which had been made or initiated were either broken or had failed. Matters had come to such a pass, indeed, that the parties to the dispute were on the point of taking up arms. It was agreed, however, to have recourse to an arbiter who should inquire into the controversy and give judgement upon it. Elected to this office, the Duke of Savoy delegated Belli to act in his stead, and the latter, unable to reconcile the disputants, pronounced sentence upon the case. It was not easy to induce the Duke of Ferrara and his people to yield to this judgement, but its acceptance by them was achieved as a result of the great authority of Emmanuel Philibert.

Besides Belli's principal work, there remain his various minor writings in the way of skilful argument, especially counsel or opinions drawn up in connexion with private litigations. In the archives of Alba there is preserved the original of one of his judgements which he pronounced in 1570 as arbiter in a boundary dispute between Count Filippo Roero, the city of Alba, and the commune of Monticello. Other judgements or legal discussions by Belli were printed by Osasco in his *Consilia sive responsa* and by Jacopo Mandelli in his *Consigli*. Four years after his death there was published one of his Latin discourses in which he upheld the right of the Duke of Savoy to succeed to the marquisate of Saluzzo. In the State Archives in Turin, among the 'Spanish Negotiations', is documented all the work to which Belli devoted himself in 1575 in order that the fortified cites of Santhià and Asti in Piedmont might be liberated from the Spaniards, an undertaking in which the agents who preceded him had been unsuccessful.

This was his final activity. A few days later, on December 31, 1575, Belli died in Turin, where he was temporarily interred in the Church of St. Augustine. In 1589 his bones were transferred to the Cathedral of Asti, where a chapel with a cenotaph was erected for him under the care of his son Domenico, who in his turn first became ambassador, and then grand chancellor of Emmanuel Philibert.

2. According to Vernazza, Belli's principal work, *De Re Militari*

*et de Bello*, was written in 1558,[1] that is to say sixty-seven years before the treatise of Grotius was published and thirty years before the publication of the writings of Alberico Gentili. The first edition, that of 1563, was brought out by Franciscus de Portonariis di Torino, a printer of Venice. This edition is embellished with epigrams in praise of Belli. In 1583, after the author's death, his work, under the auspices and at the proposal of Menochio and Panziroli, was reprinted at Venice by Francesco Zileti in volume xvi of the great collection entitled *Tractatus universi juris*.

It was after his entry into the service of the Duke of Savoy that Belli dedicated the treatise to Philip II of Spain. In this dedication Belli states that he does not wish to lay down precepts regarding military architecture or the art of war, which subjects he does not intend to treat. Nor is his object to compose a book on military affairs, but rather to show what are, according to principles of law, the just causes of war; what things are lawful and what are unlawful for princes and leaders of armies in the conclusion of alliances and in the conduct of military operations; how the captains and even the rank and file should conduct themselves in their relations with an enemy in arms, with prisoners, and with merchants and farmers both on their own side and on the enemy's side; what treatment should be accorded to enemy property, &c. The treatise, then, is an exposition of the international law of war which results from the application of the principles of natural law. Belli states that he regards such a study as not unworthy of his profession, and that he was drawn toward it by humanitarian sentiments, by the desire to render wars less frequent (he laments in noble words the readiness, even for futile motives, to make war) and to curb the abuses, the devastation, and the rapine of the soldiery. In strong terms he deplores the excesses which were committed by the military captains of Liguria, in his own Piedmont: *sine ulla . . . misericordia. Quod neque Turcae faciunt dum bellantur.*

Belli's treatise is divided into eleven parts, these in turn being subdivided into chapters of which there are sixty-nine containing one thousand and seventy-four numbered cases or questions. Some parts, however, consist of but a single chapter. The style is unpolished, rough, laboured. One is wearied not only by the excess of erudition, indubitably vast and profound though not always aptly employed, but also by the frequency of citations, by the continual use, as is likewise the case with Gentili and Grotius, of examples taken from ancient and modern history as well as of cases encountered by the author himself in his work as a judge or in the exercise of his office. Then, too, the intrusion of extraneous questions injures the unity and logical order of the treatment, for Belli mingled with his doctrine on the law of

[1] [So Belli himself also says, *infra*, p. 280; but see footnote 3 on that page.]—Ed.

nations some problems of a quite different nature which were of interest to the public administration and to other branches of jurisprudence. This work, in short, observes Mulas,[1] 'examines and determines all the questions with which it was necessary for a military auditor to be acquainted, covering a large field of public law in so far as it influences and modifies the private relations of citizens. Moreover, Belli does not content himself with expounding doctrine but, uniting to it practical experience, gives an account of all the cases upon which he had to pass judgement when he held the office of auditor, considering each case with reference to the Roman laws and the opinions of the Doctors; so that his book may be considered a veritable manual of combined theory and practice, necessary to all those who aspired to that office, then much sought after and difficult to discharge.' This manner of dealing with his subject is probably the cause of a great part of the immediate success of Belli's work, but it is indicative of an inadequate strictness of treatment, of an imperfect and insufficient method. The merits of Belli's work are principally a profound human sentiment, a notable independence of judgement, a truly singular breadth of ideas—considering the times in which they were set forth—and a laudable preoccupation in founding the solution of every question solely upon the sense of right and equity.

For Belli the causes of war are summarized under two heads: to inflict, or to repel, an injury; in other words, war is offensive or defensive. The injury can be a direct one to the belligerent nation itself; or it may affect another country to which the belligerent is bound by a tie recognized by the law of nations, such as that of alliance, friendship, or federation. Unjust is the war which is not waged for purposes of defence, for securing restitution, or from necessity. To resist injury is a right sacred to every people, and nature itself imposes the obligation to repel violence with violence, arms with arms (*Natura ipsa docemur vim vi et arma armis repellere*). It is not merely permissible, but a matter of duty to take up arms in certain cases: (*a*) for one's country, for liberty, for the public safety; (*b*) for one's own sovereign. The latter personifies and represents the nation, which thus becomes a real and living person; therefore to fight for the sovereign is to defend, not his person, but the fatherland itself.

Noble principles, these, which bear testimony to Belli's possession of a profound sense of justice. To whom belongs, he asks, the right to declare war? Considering the question apart from the form of government, the right to declare war must be considered as an inherent attribute of sovereignty. It belongs, therefore, to any people possessing its own laws, the execution of which is entrusted to one among that people who represents the supreme authority. It is necessary, then,

[1] Efisio Mulas, *Pierino Belli da Alba, precursore di Grozio* (Turin, 1878), pp. 55–7.

that one who declares war should have the lawful power to wage it (*justitia potestatis*) as well as a serious and just motive (*justitia causae*). Belli considers a declaration of war essential, and even makes the justice of the war dependent upon it. In only three kinds of warfare can it be omitted: (1) against pirates, since they are always to be distrusted. In their operations the pirates declare war on all humanity and are considered as in a state of perpetual banishment in which it is lawful for all to injure and persecute them with impunity; (2) against those whom the Emperor and the Pope have declared public enemies, because with that solemn declaration they are considered as beyond the pale; (3) against the vassals, confederates, or allies of those against whom war is waged, whenever they lend to the latter effective aid. In every other case, war initiated without a regular declaration is held, without further consideration, to be unjust.

Belli requires that between the declaration and the beginning of hostilities a certain period of time should pass; the duration of this interlude he does not determine, but it must be of such length that the enemy be not taken by surprise, and that he may utilize his means of defence. There is thus required, Belli states, not only a high principle of morality, which forbids attacking the enemy by treachery, but also a chivalrous fairness.

The war must be just, according to Belli, not merely in its origin, but in all the actions which take place during its course. Although a war may be entered into for just reasons, it becomes unlawful and unjust upon being subsequently settled in rancour or a spirit of vengeance. Unfairness toward enemies is to be condemned, it being lawful for belligerents to use only those arts and stratagems which do not have the character of perfidy. Belli severely censures the princes for their custom of enlisting mercenary forces which fight solely from a desire for booty.

Prisoners of war are to be treated with moderation. It is unjust and cruel to abuse them, and to kill one who surrenders himself is a deed contrary to the sentiment of humanity. Belli calls it infamous to exercise against a prisoner any kind of cruelty. Unlike other writers, such as Gentili, who admit of exceptions, Belli does not consent to limitations of any kind to his humanitarian doctrine.

Children, agriculturists, traders, members of the clergy, and foreigners are to be exempt from the havoc of war and must be respected by the belligerents. The ambassadors and envoys of the enemy, whose rights and duties Belli defines with precision, must also be treated with particular regard. Not even the leader of the enemy should be killed when taken prisoner, unless there be unusual circumstances which might cause an excess of leniency to result in injury to the whole nation. It is necessary, however, that the individuals spared

by the belligerents should not abuse their position. They must not show partiality for any of the contending parties, but must perform their duties without interfering in the affairs of the war. Otherwise their privileges lapse.

On the subject of belligerent occupation Belli states that the inhabitants of the occupied regions must not be considered as enemies, provided, naturally, that they abstain from all hostile acts and respect the provisional authority set up in the country. When military forces are obliged, by the necessities of war, to cross lands privately owned, they should show great moderation in their conduct; otherwise it is lawful for the proprietor to oppose their passage. Neither pillage nor the destruction of occupied things should be permitted; nor should the levying of contributions of any nature be allowed, but, instead, payment should be made for everything which has to be appropriated for the needs of the army. On the other hand, the inhabitants of an occupied province who lend assistance to the invaders are not subsequently to be considered or punished as rebels, because such assistance is deemed to be extorted by that species of terror which is caused solely by the fact of occupation.

The right to spoils is valid, according to Belli, as an outgrowth of the *ius gentium*. This right extends both to things, which constitute what is properly called booty, and to persons, whose condition becomes that of servitude. Prisoners of war among Christian peoples, however, ought not to fall into slavery, even if the war be waged against the Emperor. As regards things, Belli distinguishes between movables and immovables. The former, if taken in the enemy's camp, in which the seizing of plunder is legitimate, become without further ado the property of him who has gained possession of them. If, instead, they are taken in combat, they must be delivered to the commander, who will distribute them among the soldiers in proportion to the valour shown by each. Immovables belong only to the prince, who can neither distribute nor make gifts of them.

With reference to neutrals, Belli advances the following principles, in order that their status may not be violated by the belligerents: (*a*) that it is not lawful to imprison or molest an enemy who is found in neutral territory; (*b*) that foreigners in the territory of the belligerent states should not suffer any injury from the latter; (*c*) that neutral territory may not be violated for any purpose incident to the war, as, for example, for the transportation of prisoners. If such transportation should be proved, it is to be considered that the prisoner recovered his liberty the moment he entered neutral territory.

Concerning truces, Belli believes that a very long truce may be considered, in its effect, as a species of pacific convention; from which follows the consequence that hostilities cannot be resumed without a

new declaration of war. One belligerent having violated the truce, it becomes lawful for the other belligerent to violate it. In order to establish when a truce may be said to have been violated, it is necessary to turn to the agreements which were made in arranging it, and to determine whether they have been impaired, bearing in mind that such agreements are to be interpreted with the fidelity, liberality, and good faith which is assumed in contracts. *Neque decet*, observes Belli, *cavillari pactiones & foedera* (Part V, chapter iii, n. 5).

A special chapter he devotes to postliminy. This right does not belong to all, says Belli, nor does it pertain to all things lost in war; with respect to both persons and things its benefits accrue only in those cases sanctioned by law and custom. On persons the effect of postliminy is to cause them to return to the status which they enjoyed at the moment of their seizure by the enemy; or, better still, they may be considered as never having lost their liberty. As for things, they are deemed to belong to the former proprietor, however long a time may have elapsed between the day of their seizure and the day of their recovery; for the right which proceeds from postliminy is not subject to prescription.

Every effect of war should cease with peace. Moderation is recommended to the conqueror, who has the right to punish, but not the right to avenge himself or behave with cruelty toward the enemy. All things seized during the war, whether movables or immovables, should as a rule be restored, exception being made of booty. Peace annuls all the consequences of war and must be considered as a true *restitutio in integrum*. Even occupied territories are to be restored, except in the case of contrary stipulations. In order to arrive at a correct judgement concerning these restorations, and to ascertain when they are really due, it is necessary first to scrutinize the treaty which effects the conclusion of peace, and to study its clauses. When one can infer that the will of the parties is to arrive at a general restoration, then such a restoration is unquestionably due. But if the contrary be true, it is necessary to examine the cases individually, applying the general rules of law to each, and taking account of the special modifications occasioned by the war. Concerning hostages, Belli believes that both men and women, regardless of their own will in the matter, can be given as pledges, provided that they belong to noble families.

Fairness and good faith must govern in connexion with treaties of peace; and in their interpretation it is not permissible to give way to cavilling, lest a benefit, inspired by a feeling of humanity, be changed into a hidden deceit or treachery. Peace is not to be considered broken because of matters of slight consequence, or because of disquieting suspicion; nor is peace violated if a new cause leads to a new injury, nor if the injured party attacks the offender.

Strongly in favour of arbitration, Belli develops his conception of it with examples and very notable results. It suffices, he holds, for one of the contending parties to declare in favour of submitting the controversy to the decision of arbiters, the other party being then obliged to lay down his arms and submit to arbitral judgement. The mere fact that one combatant declines to accept arbitration is sufficient to cause the ensuing war to be considered unjust on the part of that combatant, and to invalidate all the consequences of such a war. For Belli, then, the arbitral solution does not represent simply a compromise, an amicable settlement, but a true and proper right of every belligerent, to which the opposing belligerent is obliged to submit. Its acceptance by one of the parties is sufficient to make arbitration obligatory for the other party, for in case of refusal the latter is open to the charge of waging an unjust war. It is indeed remarkable that such daring ideas, so decisively favourable to pacifism and to the institution of obligatory arbitration, should have been formulated in the year 1558!

We have thus set forth, as far as concerns those arguments which can be of interest to the modern law of war, the general features of Belli's treatise. From these it appears that he had examined all of the most notable juridical questions and had deduced from the law of nations principles which have had wide acceptance in succeeding doctrines, and some of which have entered effectively into the practice of states, having attained codification especially in the regulations concerning the laws and customs of land warfare annexed to The Hague Conventions of 1899 and 1907.

3. In what estimation has Belli's work been held by his contemporaries and by posterity?

We note first of all a really singular fact: In Alberico Gentili's treatise *De Iure Belli*, which was issued in part in 1588 and in definitive form in 1598, that is to say some thirty years after the *De Re Militari et de Bello* of Pierino Belli, the author does not refer at all to his predecessor. Not only does he fail to recognize any merit in Belli, but he disdains even to mention him. Such silence is inexplicable, the more so since Gentili himself cites, and speaks of having studied, the treatise *De bello* of Giovanni da Legnano, which is of earlier date than that of Belli. On the other hand, the latter is referred to by Gentili in his discourse in praise of the University of Perugia, where he mentions also that Belli was classed by Menochio as an eminent jurist. It may be added, too, that in his *Hispanicae Advocationes*, in support of certain opinions, Gentili invokes the authority of Belli, showing that he was perfectly acquainted with the latter's treatise, of which he cites chapters and paragraphs. Yet in the first pages of the *De Iure Belli* Gentili boasts of being the first to treat scientifically the law of nations and

says in his text: *Magnam atque difficilem rem aggredior . . . Non habent libri illi de hoc jure, non alii ulli, qui extent.* He adds: *Equidem praeter Lignani paucula huius tractatus, et aliorum nonnulla alia sparsim, legi nihil.* There is manifest in Gentili, then, an absolute disregard for Belli's work, a deliberate intent not to hold it in any esteem. For such indifference, which appears truly unjust and excessive, the reasons are unknown.

On the other hand, Belli's treatise received ample praise from other illustrious jurists of the time. Tiraboschi wrote that 'Belli was the first to apply the science of laws at any length to the usage of war'. Possevino and Menochio likewise spoke of the work as one of great value, as being a most diligent and profound commentary *de re militari*, to be read attentively by any one who must concern himself with matters relating to war.

But subsequently Belli's name and work remained for a long time wrapped in profound, unmerited oblivion. 'With the exception of Tiraboschi', says Mancini in his famous prelection of January 22, 1851, 'where is there one in our profession who has ever mentioned his name with gratitude?' Pierantoni, too, acknowledges that Belli was long forgotten and seeks to explain the fact by saying that 'this oblivion occurred because, in the often wearisome work of compiling a scientific bibliography, one writer copies another; and if an error of omission once occurs, it endures unnoted through generations and centuries, until, in a fortunate hour, a worthy and unexpected reparation is made'.

In Belli's case this reparation came principally as a result of the work of Pasquale Stanislao Mancini. Another illustrious Italian, Count Federico Sclopis, also merits notice as having recalled attention to the forgotten name of Pierino Belli, whom he considers worthy of particular mention on the ground that, taking into account the nature of the times in which he wrote, his work was developed on principles which were very liberal.[1] But the vindication of Belli is due particularly to Mancini, who says that he wishes, in homage to the truth, 'to protest against an ancient injustice and to rescue from oblivion the name of one who first attempted to give, as far as the times permitted, a framework of systematic doctrine to the principles of the science'[2] of the law of nations. While, according to Mancini, there is 'nothing which can merit the term scientific' in the earlier and mainly theological writings on similar subjects by the other Italians, Giovanni da Legnano and Martino Garati da Lodi—still less in the writings of any Spanish canonist—he recognizes in Belli's book the first juridical treatise on the subject of the law of nations, and eulogizes him particularly for having solved 'some of the grave and delicate questions propounded in the

[1] See his work: *Storia della legislazione italiana*, ii, pp. 592–4.
[2] *Della nazionalità come fondamento del diritto delle genti*, pp. 13–15.

course of his book with a conscientious and courageous liberality of principle which, considering the official position he held, cannot but be marvelled at, affording, as it does, a splendid contrast to the timorous servility of many celebrated writers of the following centuries'.

But not even the enthusiastic and authoritative testimony of Mancini has been sufficient to establish definitively the scientific reputation of Belli and to give him the place in the history of the doctrines of international law which, according to our opinion, belongs to him.

By foreign authors he is scarcely cited. Wheaton[1] in his history of the progress of the law of nations does not speak of him at all. Nys mentions him briefly, without offering any critical appraisement,[2] while De Louter,[3] in a very hasty account, says that his treatise is more complete and more systematic than those of his predecessors, but he is quick to add that the place of honour in the sixteenth century belongs, because of the importance of their writings and their breadth of ideas, to the Spanish canonists and writers Victoria, Soto, Balthazar de Ayala, Suarez, &c.

More serious are the disagreements among modern Italian writers in their judgement of Belli's work. Frequently these dissenting views appear in connexion with the evaluation of the work of Alberico Gentili; some extol the latter as the sole precursor of Grotius, and by so doing deprive Belli of all merit; others, again, rank them equally high, making it clear how much Gentili owes to Belli, even though he did not care to mention his predecessor and showed that he disdained Belli's contribution to the scientific elaboration of the law of war.

We find, for example, a favourable estimate of Belli's work in Pertile,[4] who limits himself, however, to declaring it 'more practical and able' than that of his predecessors; in Lomonaco,[5] although he does nothing but repeat the eulogies of Mancini; and in Fusinato[6] who, with more independent judgement, observes that 'however much some may in our day exaggerate the merits of Pierino Belli to the detriment of Gentili—just as those of Gentili are sometimes exaggerated to the detriment of Grotius—certain it is that Belli's treatise surpasses in importance all that had, until then, been written on the subject; and, aside from those defects repeated in some measure in all of the precursors of Grotius—which consist of a deficiency in unity of concept and in systematic treatment, of the theological direction given to juridical discussions, of a confusion of public with private law and of morality with law—one finds in Belli a certain clear and methodical spirit, a

[1] Wheaton, *History of the Law of Nations in Europe and America.*
[2] Nys, *Le Droit international*, i, p. 235.
[3] De Louter, *Le Droit international public positif*, i, p. 98.
[4] Pertile, *Elementi di diritto internazionale moderno*, p. 32.
[5] Lomonaco, *Trattato di diritto internazionale pubblico*, p. 11.
[6] Fusinato, *Introduzione ad un corso di diritto internazionale pubblico*, pp. 27–8.

relative completeness in the exposition of the theories and practice of his time, and a certain positive tendency which to a great extent anticipates later methods'.

Mention is also made of Belli's work by De Giorgi,[1] professor of the philosophy of law at the University of Parma, who says that 'as for the subjects taken for treatment, one can say that, considering the state of the science and the social conditions of his time, nothing was neglected. The doctrines are drawn from the springs of Roman and canonical jurisprudence and from the principles of equity. The style is not so polished as that of some who followed Belli: being a man who lived among arms, he is not one of whom flowers and fronds of style and eloquence are to be expected. . . . Such defects are a very slight imperfection where there is so much of the substance of juridical science.' De Giorgi affirms that 'Belli, with his treatise, gave a notable impulse to the progress of the science of international law and began the ordering and systematizing of it as a branch distinct from other related disciplines. The work *De Re Militari et de Bello*, placed side by side with the writings of other Italians which bear similar titles, does not suffer by the comparison.' A lukewarm admirer of Alberico Gentili, De Giorgi considers that the latter, in merit as in time, was preceded by Pierino Belli, 'who is in truth the initiator in Italy of the science properly called international law'.

Mulas is the chief apologist of Belli, having devoted to the latter's life and work an entire booklet which is notable for its diligence, culture, and balance of judgement. With Belli, he says, there is recognized for the first time in the realm of science an independent international law, 'which not only begins to draw away from theology but revolts against those who, in the name of theology, sought to violate its dictates. The work of Belli represents the first attempt looking toward a scientific organization of the law of nations.' Mulas opposes those who proclaim Gentili as the first founder of the law of nations. 'It is not to be denied that the work of Gentili represents an advance in comparison with that of Belli; but this progress, so marked with respect to form, actually amounts to but little as regards substance. All the questions treated by Gentili were studied and solved before his day by Belli.' The latter, says Mulas, smoothed for Gentili and Grotius the path along which they afterwards passed in triumph.

There are not lacking numerous and authoritative voices supporting the opposite view. Pierantoni, who at first[2] extolled Belli's work, speaking of it as having great historical value and showing that it represented an advance over the previous writings of a rather theological

[1] De Giorgi, *Della vita e delle opere di Alberico Gentili* (Parma, 1876), pp. 75–83.

[2] *Storia degli studi del diritto internazionale in Italia* (Modena, 1869), pp. 35–42; *Storia del diritto internazionale nel secolo XIX* (Napoli, 1876), pp. 8–12.

nature on similar subjects, later withdraws his encomiums and says[1] that Belli 'did not intend to consider the renovation of the law of war, nor to give a special organic structure to this very noble branch of jurisprudence'. Since Randolino had extolled Belli's work, saying that in it 'there breathed almost everywhere a breath of new law', Pierantoni opposes him by maintaining that such a judgement is contradicted by all the decisions and rules of law reported by Belli.

Pasquale Fiore likewise says that,[2] if it be just to commemorate Belli among those who dealt with questions of international law before Gentili and Grotius, yet it is to no purpose to exaggerate his merit. 'Belli's work lacks unity of conception, systematic treatment, and the complete separation of questions of international law from questions of private law. One finds, it is true, rules relative to war, but the author discourses more at length upon the organization of armies, upon the rights and duties of persons who belong to the army, upon military administration, &c.' Fiore adds that, 'if one wishes to consider some one who had written about the law of war as a precursor of Grotius and Gentili', it is necessary to give the precedence to Giovanni da Legnano.

But Belli's severest critic is Speranza,[3] a fellow-countryman and a biographer of Alberico Gentili. Speranza recognizes in Belli, 'the merit of an ample juridical erudition, of an unusual fund of good, practical sense, of a certain method in setting forth his vast material, and finally the merit of a humanitarian sentiment . . . but it is quite another thing to regard him as the precursor of a law in process of formation, as was the case with international law. Far from being that, he was, together with Ayala, the last of that company of political jurists and canonists who gathered together and expounded the rules of the canonical equity which was introduced into the practice of war as subordinate to the policy of the imperial theocratic law.' According to Speranza, 'Belli did no more than repeat what the preceding jurists and canonists devised on the basis of natural equity. . . . One cannot even give Belli the honour of having been the first to assemble in methodical exposition the scattered semi-juridical, semi-political disquisitions upon the subject. For Belli drew largely upon Legnano, and even more upon the latter's imitator, Garati, not only for methods of expounding whatever concerns war, but also for the rules in force. . . .' In a word, Belli, 'far from representing in his work an improvement in the law of nations, was a simple expositor of practical cases relating to the subject, according to the knowledge and principles of his time'.

4. Our own opinion among such disparate judgements remains to be stated.

[1] *Storia degli studi del diritto internazionale in Italia* (II ed., Firenze, 1902) pp. 155–70.
[2] *Trattato di diritto internazionale pubblico*, III ed., i, pp. 50–1.
[3] Giuseppe Speranza, *Alberico Gentili*, Parte seconda (Ascoli Piceno, 1910). pp. 82–99.

Mancini wrote[1] that 'in the material treated, in its arrangement, in that logical form of argumentation which was esteemed in his century, as well as in the erudition in which there was no flaw, one recognizes at first sight' that the work of Belli 'served as an example and guide to Grotius and Gentili'. What is the ground for such an assertion, so important in judging of the value of Belli's contribution to the scientific foundation of international law? Upon this point Mulas instituted a diligent and accurate comparison which, even though appraised with moderation and prudence, seems to us convincing and such as to demonstrate that Gentili's work (although written thirty years later) and Belli's treatise have various points in common, and that the similarities in the two works cannot be accidental and entirely independent of each other.

Common to both Belli and Gentili is the conception of war, which they consider as derived from the law of nations, as the sanction necessary to maintain that law inviolate. 'War is a necessity, and hence, in order that it may be juridically recognized, it is needful that this characteristic of necessity be so clearly manifest that war is viewed as something from which it is impossible to retreat, as the sole efficacious means of re-establishing the harmony of law among nations—as an evil, in short, but a lesser evil than that which would proceed from leaving the rule without sanction and the law subject to the will or caprice of the strongest.'[2] Belli's statement is: *Bella nisi ex magna causa non suscipi, eaque iusta, & necessaria, censent boni omnes* (Pt. II, chap. i, n. 1) and in another place: *Bellum debet esse necessitatis* (Pt. I, chap. v, n. 13). Later Gentili repeats in incisive phrases: *Iustum bellum habet semper necessitatem, ut ex necessitate bellum descendit* (Bk. III, chap. xvii). And Grotius: *Rara . . . belli sumendi causa est quae omitti aut non possit aut non debeat* (Bk. II, chap. xxiv, sec. 8).

Belli groups wars under the heads offensive and defensive: *Originem ipsam bellorum inter homines ab iniuria processisse credendum est sive inferenda sive propulsanda.* Substantially the same idea is expressed by Grotius: *Causa iusta belli suscipiendi nulla esse alia potest, nisi iniuria* (Bk. II, chap. i, sec. 1). Gentili makes a more complicated division of the causes of war under three heads: divine, natural, and human; but he finishes nevertheless by recognizing the principle that wars have the object of inflicting or warding off an injury.

Both Belli and Gentili hold that a war waged without a prior declaration is unjust. Gentili further decides definitely on a period of thirty days as the length of time which should elapse between the declaration of war and the beginning of hostilities, while Belli abstains from a definite decision.

The two material and express conditions upon which Grotius

[1] *Prelezione, op. cit.*, p. 13. [2] Mulas, *op. cit.*, p. 75.

makes formal war depend, that is, authority and the declaration—the power to make war, either by direct decision, if the belligerent enjoys sovereignty, or by permission from his immediate superior, and the regular challenge which must be given before taking up arms—are both to be found already indicated in Belli's treatise. The necessity for conducting the war with justice, and the condemning of unfairness toward enemies and of treachery in the arts of war, are also set forth by Belli with arguments and principles which do not differ greatly from those of succeeding writers. Gentili's views on truces, on persons to be spared from the ravages of war, on the treatment to be given to prisoners of war, likewise show a notable similarity to those of Belli. The latter is rather the more generous of the two toward prisoners of war, since he would have them exempt from every kind of cruelty, while Gentili limits himself to declaring the killing of prisoners to be inhuman, but enumerates ten cases in which it would be permissible as an exception to injure them.

With reference to alliances, Belli teaches that a pact which can draw an ally into an unjust war must be considered null and void (Pt. II, chap. xvii, n. 8). One finds the same principle confirmed afterwards by Grotius (Bk. II, chap. xv, sec. 13). We may note also that the question whether it is permissible for a prince to decide a war by a single combat, which was examined and determined in the negative by Gentili, had already drawn a like answer from Belli.

Recommendations to the conqueror to be moderate as regards conditions of peace are to be found in both Gentili and Belli. The former lays down more exacting conditions, for he states that, in addition to the cost of the war and the indemnity to be imposed upon the conquered, the conqueror has the right to exact tribute both in money and in territory, to retain permanently the places occupied by his army during the war, to destroy conquered cities, &c. According to his opinion, the territories and things occupied belong to the conqueror, unless there are treaty stipulations to the contrary. But to Belli this precept, as afterwards laid down by Gentili, constitutes the exception rather than the rule; he favours a *restitutio in integrum*, provided that the parties have not agreed otherwise in the treaty of peace.

Finally, the idea of arbitration is common to both Belli and Gentili. But the development of this idea seems more decisive and rational in the case of Belli who, as we have already mentioned, threatens with the guilt of unjust war the belligerent who refuses to accept the proposal of the opposing belligerent to submit the dispute to arbitration; whereas Gentili with more vagueness closes the third book of his treatise with a prayer to God that, wars having been made to cease, the benefits of peace may be enjoyed by all humanity.

From this rapid comparison, every part of which it would be

interesting to develop in full, there seems to us to emerge the conclusion that Gentili must have utilized and profited by Belli's treatise. That he was acquainted with it is certain, as we have already observed. Is it possible that he took no account of it while preparing to write on the same subject? Progress in every science is the product of cumulative labour. Every student profits by the efforts of his predecessors, by the results they attained and the materials they collected and elaborated; he seeks to advance a step, to complete a more perfect work. But fairness requires that he should recognize how much he owes to those who preceded him, that he should not discredit or impugn their merit in order to magnify his own. Grotius mentions the help he derived from the study of Gentili's work, and the latter in turn renders honour to the Spaniard Francisco de Vitoria, to whom it is certain that Pierino Belli also owed much. In the light of such just acknowledgements Gentili's absolute silence regarding Belli affords an unpleasant contrast; a contrast which, inasmuch as the similarity in treatment and solution of many questions of the law of war by the two writers cannot be purely accidental, is aggravated by Gentili's lofty affirmation of having been the first to treat of the weighty and difficult subject.

Extreme and unjust, moreover, is the accusation against Belli that he merely repeated the rules of canonical equity already expounded and collected by other jurists, without attempting any direct reform designed to liberate the study of international law from the bonds of theology and to give it the dignity of an independent discipline.

For the splendid endeavour to detach international law from certain theological premises upon which it had until then been based, and for initiating its amalgamation with the *ius gentium*, the credit is due to Alberico Gentili and above all to Grotius, who, belonging to the Protestant faith, were free from the bonds which restricted the liberty of thought of a sincere Catholic like Belli. The latter could not develop in all its consequences his idea of determining the rational principles of the law of war by seeking after them outside of theology, by substituting reason and the authority of history and jurists for those purely canonistic rules upon which the preceding writers based all their doctrines. In him, intellect must many times have bowed to faith.

Nevertheless, even though it may not be clearly manifest, his endeavour to emancipate the treatment of international law from theological meshes seems to be indicated indisputably by his doctrine as a whole. 'It is true', observes Mulas,[1] 'that theological reminiscences still form the background of Belli's work, and that it also abounds in concessions of privilege to priests and in frequent subordination of his judgement not merely to the Bible, but also to the teachings of the canons or

[1] Mulas, *op. cit.*, p 63 et seq.

of the holy Fathers. But there are conclusions which show that, though remaining firm in the Catholic beliefs to which he clung most tenaciously, he tended to withdraw international law from the authority whose yoke it bore.' The affirmation that war and peace appertain to the law of nations, from which principle it follows that all international controversies should be regulated exclusively by the same law of nations and not by theological precepts; the continual recommendation of humane treatment during warfare, and of moderation on the part of the conqueror; the opinion that, in cases of urgent necessity, the privileges and favours enjoyed by the clergy lapse and that they, equally with the laity, are obliged to bear the burdens necessary to render the state strong and secure, there being in such cases no distinctions among its citizens; the further affirmation that, in moments of extreme danger when every hindrance may turn out to be fatal, it is permissible to seize necessary resources wherever most convenient, not even exempting the treasury of the churches; and finally, the authorization to resist the instigations of the popes which were directed toward violating the law of nations—these and other principles and concepts which are found in Belli's treatise reveal clearly a mind which not only aimed to free itself from theology, but rebelled against those who, in the name of theology, attempted to violate the principles of the law of nations. The extent of Belli's merit becomes apparent when one reflects that he wrote in a period in which theology was considered the regulating guide for every human activity, and that to it, following the usage and traditions of the time, even Belli had to declare respect and homage. But such inevitable declarations did not prevent him from seeking outside of theology the bases of the new conception of law, or from deciding the individual questions of the law of war apart from theological premises. Gentili and Grotius proceeded much farther in that direction; but it seems unjust and contrary to historical truth to deny to Belli the praise for having been their precursor, for having been the first to attempt, in the face of difficulties presented by traditional conceptions and formulas, to raise the treatment of international law to the dignity of an independent scientific discipline.[1]

The criticisms directed against the work of Belli as regards lack of logical order, deficiency of style, confusion in treatment brought about by the injection of extraneous questions, lack of unity, an insufficient critical spirit—all these criticisms are in themselves quite just; but justice requires that account be taken also of the early period in which he wrote, of the difficulty inherent in a first, uncertain attempt at scientific elaboration, which was carried out under adverse conditions and in which one cannot of course expect the excellence which the scientific elaboration of a given system of rules attains only at the

[1] G. Chialvo, *Il precursore italiano del diritto internazionale*, 1919, pp. 20–4.

time of perfect maturity. As for the charge against Belli regarding excessive and sometimes irrelevant erudition, regarding the over-use of citations and examples drawn from the most diverse sources and often stifling with the voice of authority or precedent the free and rational development of points and principles—one is dealing here with a defect which will be met with also in Gentili and Grotius. On the other hand, we have already seen how, in the study of the most important statements on the law of war, Belli indicated solutions and principles, many of which we afterwards find in Gentili, in Grotius, and even in modern treatises.

Having recognized in Belli the merits which in our opinion he possessed, we do not intend, however, to deny his inferiority, from the point of view of scientific elaboration, not only to Hugo Grotius but also to Alberico Gentili. Mulas, though a fervid defender of the merits of Belli, recognizes nevertheless that Gentili treated the subject 'in a more scientific manner, purging the law of nations of a multitude of distinctions and extraneous questions. Furthermore, Gentili possesses the merit of a degree of critical judgement which, although still rudimentary and crude, reveals the tendency of the human spirit to rise to a conception of the highest principles. We find Belli, on the contrary, continually referring to examples from history, to the laws and customs of peoples, and to the decisions of the Doctors; but this patient labour of erudition is not co-ordinated and directed toward a definite and superior purpose, nor does it aim to evolve from all these examples a single harmonizing dictum which would reconcile the diverse conceptions. Such, however, is the aim of Gentili, who is not content to cite the laws and customs of peoples, but is continually comparing these sources, and from such comparisons endeavouring to derive general rules which he then sets about applying to the solution of individual questions.'[1]

Even against Gentili, however, serious criticisms were directed by Grotius himself, by Bynkershoek, Heineccius, and others; criticisms concerning defective method, insufficient breadth in the treatment of his subject, excessive introduction of unwarranted elements which retard the rational development of the questions treated, obscure distinctions between morality and law and between the latter and political matters, the ascription to Roman law of an exaggerated influence on international relations, and so on.

Impartial criticism, while recognizing Gentili's superiority to Belli, assigns to the latter a notable place among the precursors of Grotius. Intuitively, though in an uncertain and imperfect manner, he apprehended the need of ridding the doctrine of international law of the theological premises upon which it had until then been founded;

[1] Mulas, *op. cit.*, p. 90 et seq

and, combining it with the law of nature, he gave thereby to the law of nations an independent base grounded on liberal reasoning. Progress in science is generally the fruit of the cumulative labour of a considerable number of writers, each of whom continues and betters the results of those who preceded him, until there appears one who sums up the previous efforts in a decisive and perfect elaboration. Pierino Belli was certainly among those who prepared the ground upon which Grotius was afterwards to raise the superb edifice of his treatise *De Iure Belli ac Pacis*.

Arrigo Cavaglieri.

*Naples, the University.*

# TRANSLATOR'S PREFATORY NOTE

The text of Pierino Belli's *De re militari et bello tractatus* differs little from that of other works of its class. A few words of explanation, however, may not be out of place.

The Synopses prefixed to the various chapters are not correctly so designated. Apparently after the chapters themselves were written out, checks were entered in the text against such points as might be gathered up into an alphabetical index at the end of the volume. In the margin opposite the points checked a series of numbers was written, without regard to the relative importance of a point or its immediate relevancy to the subject of the chapter. By listing these ill-assorted items in the order in which they appear in the text the 'Synopses' are made up. Some of the effects are startling. Thus, in the chapter 'On the Office of Governor' the 'Synopsis' develops the following sequence:

*Who are obliged to repair or to sell buildings?*
*A madman should be put under restraint by his relatives.*
*Neglect should not go unpunished when it results in damage to another.*

Obviously this sort of analysis affords no adequate working basis for paragraphing the English version, which is arranged without regard to the marginal numbers. In some cases the 'Synopses' are even misleading, in that the phrases caught up from the text to be incorporated there are incidental remarks that do not represent the view which the author himself is developing in the body of the chapter.

Belli is a rather discursive writer. Many of his sentences are long and rambling, with parenthetic remarks on minor details. To help the reader to follow the thread of the argument, free use has been made of round brackets to set off matter that is parenthetic.

A rather serious difficulty was encountered in the looseness with which quotations are made from classical authors, notably Livy. Some variation from the texts as printed to-day was, of course, to be expected; but the matter is further complicated by slovenly citation, reliance upon memory, and, apparently, even intentional manipulation of the text, together with failure at times to understand the original. All this puts the translator in a position of great disadvantage; he does not wish to report an ancient writer as saying something which he did not say. Where discrepancies are too glaring to be glossed over, attention is called to the fact in a footnote.

Belli's extended treatment of the Roman civil service presents another special problem. There are no recognized standard translations for the names of many of the multitudinous officials in this list; and in some cases even the duties of an office are not certainly known. In dealing with this matter, the arbitrary rule was adopted that only those titles should be translated which have well-recognized English renderings, or which lose nothing in clearness by translation. In other cases it has seemed best to retain the Latin designations, e.g. *agentes in rebus*.

As for the references in the text, citation from the *Corpus Iuris Civilis* is made on the basis of the edition of Krueger, Mommsen, and Schoell, where the renumbering of the third volume must be taken into account. References to the *Feudorum Libri* conform as far as possible to the text and appendices as found at the end of the third volume of Kriegel's edition of the *Corpus Iuris Civilis*.

The style used in citation has been made to conform with the practice in this series.

# EDITORIAL NOTE

Professor Nutting wrote the *Translator's Prefatory Note*, printed on a preceding page, shortly before his untimely death, on September 23, 1934.

In the course of preparing his scholarly translation, he had marked many errors in the edition of 1563, but had not completed this phase of his work. His notes and correspondence, however, indicated to some extent what he desired particularly to bring to the readers' attention, and the work on the errata was therefore continued along these lines.

Before referring in detail to the treatment of errors in the Latin text, it may be appropriate to offer a word of comment on certain critical problems involved in editing the texts of the *Classics of International Law*.

In medieval and renascence Latin there are a number of things which differ radically from the classical usage. There are constructions which would not have been admitted by Cicero, orthography as curious to the modern eye as it would have been to Vergil's, and words which would have been strange even to St. Augustine. While these changes are, historically, an indication of the language's development and vitality, they have become since the end of the renascence, with its return to the classical standard, more obsolete and archaic from the point of view of the student of to-day, than the tongue spoken by Plautus two thousand and more years ago.

It may thus be said that there is a medieval as well as a classical standard, each applicable to the literary productions of its own period. The texts published in the *Classics of International Law* belong wholly to the more recent period, and in view of this fact the general policy which has been adopted is to consider as proper errata only those variations from the accepted usage of the middle ages and renascence which resulted from printers' errors, or carelessness on the part of the author or the early editors of the work involved.

Pierino Belli's *De re militari et bello tractatus* is illustrative of these conditions. The vowels *u* and *o* are interchangeable in the late Latin used in this text: consequently, when Belli quite consistently writes *lungus* for *longus*, and *lungè* for *longè*, it has seemed proper not to consider these as errata. By the same token, *moltitudinem* on page 41 of the Latin text, is not an erratum. Again, *e*, *oe*, and *ae* are interchangeable; but these, though not errata, require special mention in that they are employed in certain words where difficulty might be encountered by a modern reader, because of confusion between two or more words whose stems or endings contain the interchangeable vowels. An editorial footnote has therefore been added at the appropriate points in the translation, by way of clearing up the difficulty.

Modern orthographers reserve the letter *y* in Latin for certain well-defined cases; for example, to indicate the presence of the Greek letter *υ* where Latin derivations from a Greek original are concerned. The Latinists of Belli's day recognized no such distinction (see p. 100 of the Latin text, *Hyspani*; p. 108 verso, *Aegipto*).

*Michi* for *mihi* (see p. 113 verso) is not common in the sixteenth century, but it was still good usage. Some consonants interchange almost as frequently as the vowels: *c* and *t* when followed by *i*, and *m* and *n*, are perhaps the most outstanding examples. The usage with regard to the doubling of consonants is variable and irregular; in occasional cases (as for instance on p. 34 *consumatum* for *consummatum*) leading to a possible confusion, to obviate which a footnote has been added. Here and there in late Latin we come across words which are apparently provincial restorations, as it were, of the very ancient Latin forms. Belli provides an example, on p. 127, writing *obmissum* for *omissum*.

The modern reader of any medieval or renascence text is confronted at the outset with what may be termed a mechanical difficulty. This is the matter of abbreviations. The less obvious ones, such as *Dñm* on p. 128 verso, and *cõis*, on p. 123 and passim, have been noted in the footnotes; but the more commonly used were not considered as requiring

comment: such, for instance, is the use of the ampersand (&); or of the tilde or long mark over a vowel to indicate, as a general rule, the omission of *m* or *n*. Lines as abbreviated as the following are, happily, of infrequent occurrence (p. 47 verso): *Quaesita ꝑ hostes & recuperata si iterū eis ꝙrātur, an ī priorē statū īcidāt.*

Applying then, as a broad rule, the editorial policy that late Latin works should be criticized by the standards of writing current at the time they were written, the editor has endeavoured to carry out Professor Nutting's plan, making free use of his notes, within the lines drawn by that policy. As Professor Nutting had prepared no list of errata for the edition of 1563, but had commented on many errors in notes to the translation, it seemed advisable to deal with all of the errata in footnotes to the English text, rather than to prepare a separate list for publication with the reproduction of Belli's text. The numerous footnotes which the translator had written up in their final form, and for which he himself assumed full responsibility, have been appropriately signed with the letters Tr. The notes added by the editor have been marked Ed.; but for these also most of the credit should go to Professor Nutting, since, as has been indicated above, they are almost entirely extensions of the jottings made by the Translator upon his copy of the Latin text.

The translation is entirely the work of Professor Nutting, with the exception of a very few minor changes of an obvious nature, which the translator himself would probably have made had he lived to revise the final proofs.

James Brown Scott,
*Editor.*

[*The Title-page of the Edition of 1563*]

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# A TREATISE ON MILITARY MATTERS AND WARFARE IN ELEVEN PARTS

By

PIERINO BELLI OF ALBA
Noted lawyer and Adviser to the most serene
EMMANUEL PHILIBERT, DUKE OF SAVOY

In this work, in addition to the discussion of military matters, many points are touched upon incidentally which concern civil administration. Very essential for all judges

With Authorizations

Printed at Venice by
FRANCISCUS DE PORTONARIIS
1563

# [COPYRIGHT]

## EXTRACT FROM THE KING'S PATENT[1]

On this day, the twenty-eighth of August, 1562, the King, being encamped before Burgos, has given permission, authorization, and the right to Lord Pierino Belli of Alba, counsellor of state to my Lord the Duke of Savoy, so far as he may and in so far as it is for him lawful, to have published by such printer of this realm or any other, and in such volumes and style as he shall think best, a book written by him and entitled *A Treatise on War and Military Matters*, with a special provision in favour of said printers that no other than they may sell, distribute, or expose it for sale in any way whatsoever during the time and period of ten years next ensuing and following, beginning with the day on which the said book shall come off the press. This injunction His Majesty very specifically lays upon all publishers without exception,[2] under pain of confiscation of said books and a fine of amount not specified. With orders from His Majesty aforesaid to dispatch this present warrant for the enjoyment[3] of the said permission, the Queen, his mother, being present.

ROBERT.

*Also with the authorization of the distinguished Senate of Venice and other princes*

[1] [For *priuillege* read *priuilege*.—ED.]
[2] [For *quelonques* read *quelconques*.—ED.]
[3] [For *ionissance* read *iouissance*.—ED.]

# [DEDICATION]

*For the most eminent and invincible Philip,*
*King of Spain,*
*Pierino Belli, a lawyer, prays health and prosperity.*

With good reason it will cause all men to wonder that I, a man of such poor wit and lowly fortune, have ventured to address you in my writings, Philip, greatest and most invincible, and to dedicate to your name my efforts, such as they are. Indeed, some will criticize and reprove me, on the ground that such a course is scarcely permissible to the greatest geniuses and the most learned and prominent men, among whom I should not venture to claim a place. The very title of my work will confirm this feeling regarding me; for just as Hannibal laughed to scorn a philosopher who in his presence held forth dogmatically on the duties of a general and other matters pertaining to the business of war, so, in addressing a treatise on this same subject of war to the greatest of kings and a pre-eminent warrior, I shall seem to be guilty of presumption and rashness. In the first place, I must absolve and clear myself of this guilt, or [**iv**] at any rate I must in some way excuse or extenuate it. I will answer then, first, that in this book of mine I profess to be no expert in the art that teaches how to select recruits and other soldiers, or how to instruct them in marching, in leaping, in charging, in the use of missiles, in avoiding and inflicting wounds, and all the rest; nor (do I propose) either to instruct the general himself as to what sort of place he should choose as a location for a camp, how to draw up his line, what troops to hold in reserve, with what devices he should meet the craft or valour of the enemy, by what methods and with what engines he should defend his own cities or take those of the enemy. In fine, I do not mean to lay down rules and regulations for warfare; for I should be most foolish to teach and to pursue such subjects. Rightly would it be said to me, 'The cobbler should stick to his last'. And yet those do not go so far astray as to be inexcusable or ridiculous who write such treatises to kings and generals. For in happier times there were men who so wrote—as Frontinus to the deified Trajan, Aelian to Hadrian, Flavius Vegetius to Valentinian, Modestus to Tacitus, and earlier than all these, Paternus to Augustus himself, the greatest of all generals. Such effort was not counted vain or perhaps profitless. But my present task is far different; far remote is [**v**] my plan and intention. For inasmuch as, during almost all past ages, in obedience to a standing principle derived from the very law of nations—or, more probably, instilled into their minds by the act of God himself—kings and peoples have followed the practice of not declaring war before the reason and cause for declaring it have been shown, it is in the highest degree proper and even a duty that Christian kings, princes, and peoples adopt this principle. I should not

hesitate to say that those who fail to do so violate the law of nations and even that they sin grievously not only against the whole human race but also against God himself. For, with justice absent, what is warfare other than open brigandage? For what is less seemly for a ruler, especially one who believes in Christ and furthermore in God, than to authorize killing, plunder, fire, and devastation, and, in fine, the numerous and awful crimes that are committed in wars, if he issues his orders in sheer wantonness and not in accordance with a fixed and approved principle? What of the fact that it is not enough that the aforesaid causes and preliminaries (of war) be regular and legal, unless wars are carried through and finished on the same basis upon which they were undertaken? For not because a prince has the ability and also the authority and justification for waging war ought he to launch an attack upon all persons indiscriminately, even though they be in the enemy's territory, and to let loose his soldiers (upon them) [**vi**]. Consideration must be had for persons, things, times, and much else. Moreover, he will not give a free hand to the soldiers, even though their action might be to his own advantage; but he will consider what is right and what is expedient. Turning these matters over in my mind, in view of the fact that, from the time of the declaration of war by Francis, King of France, against Charles, Duke of Savoy, I served in the camp of the invincible Charles the Fifth, your father, greatest of kings, under the command of Alfonso d'Avalos, Marquis del Vasto, under Ferrante di Gonzaga, and under the Duke of Alba himself, and was put in charge of the administration of law and justice in the military court, whence also the name 'Judge' accompanied my appointment; and, in view of the fact that, after the direction of such great realms was taken over by Your Royal Highness, (I served) under the Reverend Cardinal of Trent[1] and the Marquis de Pescara himself—a man famous not less for his own valour and renown than for his father's—being advanced from the aforesaid rank to the duties of war minister, I continued under the above-named officers and finally under the Duke of Mondragone until the end of the war and the conclusion of the peace, having entered the service with dark hair and vigorous health, and laying it down with hair entirely white, and with strength all but worn out; revolving, I say, and considering these things for many years in my mind, I judged it a project not vain or unworthy of my profession, of my purpose, and also of a dutiful mind, [**vii**] that I should write something about war and military matters, so that I might admonish rulers what their powers are, and what is permissible; what is their right procedure in declaring war, and what in making and observing treaties; what in these respects are the powers of the commanders of armies on their part, and

[1] [Christoph, Cardinal von Madrutz (Madruzzi), Prince-Bishop of Trent from 1539 to 1567, during hose occupation of the see the renowned Council of Trent was held.—Ed.]

what is unlawful for them; what on the part of the soldiers is the proper attitude toward armed foes, toward prisoners, and toward surrendered men; what is lawful among themselves, what in dealing with provincials —whether those of the enemy or their own—what in respect to any class of people and to all things whether animate or inanimate; what, finally, the provincials should do or suffer in their relation to the prince who is at war, and what with reference to the soldiers for their part. I hoped that if I should definitely formulate such matters and transmit them to posterity, I should accomplish these two things: first, that I should show that I had not lived all these years idly and lazily; second, that I had benefited the state a little, if not much. As for the fact that I singled you out, invincible king, as the one to whom I should dedicate this trifling gift and work, it was not so much a matter of boldness on my part as of obligation and debt. For since through all my best years I served under your father Charles, the most exalted and greatest of the monarchs of his day, and under your Highness; [**viii**] and since under the shield of both father and son I was sheltered from the violent storms and the whirlwinds of events, and was the recipient besides of generous gifts, to whom was it more fitting that I manifest the earnest and devoted gratitude of a responsive mind, as best I might, than to the son of so eminent a commander, himself so great, so invincible, so resplendent, so high-souled a king? To whom could I with more fitness write on the subject of war than to a man who had finished with high good fortune and settled with the greatest generosity wars of the first magnitude that had run a wild course through many generations, and of whose conclusion and end there was no hope? To whom, in fine, was it more fitting that I address words touching treaties and the peace during which I have written my humble work than to the king who, almost with no effort, and with the most righteous and fair laws, and with a full mede of justice, restored to the earth peace that had long been in exile, desired of every one, despaired of by all, and anticipated through the grace of God alone?—and with such sincerity, and with such gratitude and joy on the part of rulers, states, and peoples, that it was his choice to adjust matters and to further general security rather than to be himself a victor. Now since it was provided by the law of the Persians that no one should approach the king without a gift, and also by the divine law that none should appear before God empty-handed, do you also, best of kings and mightiest of earthly lords, with the ready kindness known to all accept this gift, not such as you [**ix**] should receive, but such as I can give; and permit me, a servant devoted to Your Majesty, to pass in quiet under your protection my old age and what remains of life; and accept with your accustomed courtesy and kindliness this little gift in the spirit of the giver rather than on the basis of its merits. Farewell, sole hope of the Christian world and ornament among kings.

[x]

# [LAUDATORY EPIGRAMS]

## OF FEDERICO ASINARI
## CONTE DI CAMERANO

Running through the *Iliad*, Belli noted Mars laid low by a blow from Pallas; whereat he groaned and said: 'I have worked up this subject. Take instruction, Mars, [from me]. When trained, you will not need hereafter to fear a brush with Pallas.'

## PHILIBERTUS À PINGON, BARON OF CUSY
## REFERENDARY OF SAVOY, ON
## THE TREATISE OF PIERINO BELLI

To Homer is known only the soldiery of Achilles or Ulysses; Vergil has naught but Aeneas; only the battle-lines of civil war did you sing, Lucan; the trumpet blast of another[1] produces only a *Thebaid*. All the Greeks and Romans who have written treat of some detail or other that is incomplete. Enough; in times past also you have compiled one-sided treatises. Belli at home develops into an art warfare that is to be waged abroad.

## OF FRANCESCO FERRARI
## ON PIERINO BELLI'S BOOK

Among the greatest gifts which the King of Heaven had granted the tribe of Jesse, [xi] fourteen gems gleamed with the light of dawn on the shoulder of the priest. Through him a suppliant leader in adversity would ask direction from the Holiest of Divinities. But now, if yours be the grim business of Mars,[2] and you are hard pressed by a godless adversary, happy will be the issue for one who follows steadfastly the principles laid down by Belli. If, on the other hand, the strife past, you are enjoying unbroken peace, the page of immortal Belli has eloquently set forth what treaties are most just, what mercy (should be shown) to vanquished foes, how best a government is established. On all counts one might be in doubt—whether Belli is braver as a general, wiser as a senator, or more eloquent as a speaker.

## ON THE SAME

Belli has revived the laws of the camp and Roman arms, and restored them to their old glory. By this science the Carthaginians were crushed, Niphates defeated, and the necks of kings were sent under the Roman yoke. Unnumbered triumphs are due to you, Pierino, who auspiciously regulate savage war. Whether a general prevails on sea or land, recognition should be given to you; to you it is entirely due that he prevails.

## ANOTHER SELECTION ON THE SAME

At the birth of Belli a sharp contention arose among the gods; for each wants Belli for his own. [xii] In her own right fostering Pallas claims him; and the goddess declares

[1] [i.e. Papinius Statius.—Tr.]
[2] [For *gradivi* read *Gradivi*.—Tr.]

him to be set apart for her and her peculiar possession from his earliest years. The noise of 'War'[1] roused up Mars; he thundered, and in turn drew Belli under his jurisdiction. Phœbus Apollo feels outraged that he has lost a poet; for it is said that Phœbus was the one who gave laws to the earth. But because he[2] tells on what principles the majesty of thrones and proud sceptres are to be handled in peace and in war, Heaven's high king makes him a partner in his counsels and assigns him to the highest orders among the gods.

### OF BERNADINO FRAGHETTI, SECRETARY TO THE MOST EXALTED PRINCE OF SAVOY'S AMBASSADOR TO THE VENETIAN STATE

Finely[3] and well, Belli, you tell how wars are to be conducted, whether they are to be waged at home or abroad. Many poets have sung the high deeds of heroes, thereby winning for themselves undying fame. But the writings of the ancients should scarcely be imitated by gifted geniuses; your writings are more praiseworthy and finished. Whether the practice of war is desired by the recruit or its principles by the man of learning, he should read these and the manner of conducting a camp. Hence, since you impart splendid rules for the service, greater praise from all is due to you than to those whose ambition it was to set forth the deeds of heroes in ornate phrase and with imagery utterly fanciful.

[1] [The pun upon the name of Belli cannot be represented in English.—Tr.]
[2] [i.e. Belli.—Tr.]
[3] [Another pun upon the name of Belli.—Tr.]

[1]

# A TREATISE ON MILITARY MATTERS AND WARFARE

in Eleven Parts

by

PIERINO BELLI

of Alba

Noted lawyer and Adviser to the most serene
Emmanuel Philibert, Duke of Savoy

## Part I

# CHAPTER I

## ON THE ORIGIN AND ANTIQUITY OF WAR

### SYNOPSIS

1 In the city,[1] brother was first to kill brother.
2 Battle was waged in Heaven.
3 Wars will endure even to the end of time.

1 It is a well-established fact that war is an ancient business among men, and that its beginnings are almost coincident with those of the human race itself. For, at a time when there were but two brothers, sons of that common parent of us all, Sacred Writ records that one made an assault upon the other;[a] so that it might truly be said with a certain poet:

> In brother's blood primeval sod was steeped,

as is written elsewhere of the founders of Rome.[2]

2 In fact, even before the world itself was fashioned by the supreme Artificer, we read that there was war [1′] in Heaven[b]—so difficult and unattainable has God willed that peace should be, for earth and Heaven, without an antecedent state of war. It is no occasion for surprise, therefore, that in all ages since the world began, peoples, kings, and other rulers have persisted in war even down to our time, as described in the Holy Bible and the records of the Greeks and 3 Romans. And that there will be no end to this evil until the world itself shall pass away, we are warned by divine utterance.[c]

Planning, then, to write at some length on war and military matters, I shall first consider the force and content of the word 'war'.

[a] *Genesis*, iv [8].

[b] *Revelation*, xii [7].

[c] See *St. Matthew*, xxiv, and *St. Luke*, xiii [3]

# CHAPTER II

## WAR; WHENCE NAMED

### SYNOPSIS

1 Derivation of the word *bellum* ('war').
2 The form *duellum*.
3 The word *perduelles* ('enemies').
4 Derivation of the terms *milites* ('soldiers') and *militia* ('military service').
5 Derivation of the word *exercitus* ('army').

1 Pompeius Festus[d] believed that *bellum* (war) was named from beasts (*beluae*), as being better suited to beasts than to men. So Cicero, too,

[d] [*De verborum significatu*, p. 33 M.]

[1] [i.e. Rome.—Tr.] [2] [Lucan, *Pharsalia*, I. 95: *Fraterno primi maduerunt sanguine muri.*—Tr.]
[3] [Apparently the reference is to *St. Mark*.—Tr.]

says: 'Inasmuch as there are two kinds of contention, one through discussion and the other through force; and since the former is appropriate for men, and the latter for beasts, we should have recourse to the latter only in case we may not employ the former.'[a]

[a] [Cicero, *On Duties*, I. xxxiv.]

Again, Festus[b] says that the earlier form of the word was *duellum* 2 —not implying activity of two individuals, but of two parties;[1] hence enemies, too, were called *perduelles*, as persons persistently warring and 3 opposing. Thus in another place Cicero says: 'To a person who, strictly speaking, was *perduellis*, our ancestors applied the name *hostis*, the mildness of the term glossing over the ugliness of the fact; for in earlier times the word *hostis* signified what 'foreigner' does to us.'[c]

[b] [*De verborum significatu*, p. 66 M.]

[c] [Cicero, *On Duties*, I. xxxvii.]

And not inaptly would the word *bellum* be derived from the adjective *bellus*, i.e. 'beautiful'; for an armed line drawn up in battle array is splendid and terrible. Or perhaps it is so named, by antiphrasis, from its evils, as being not at all fair or beautiful; just as Festus once more states that the word *militia* ('military service') is derived from *mollitia* ('effeminacy')—though another view was held by the jurisconsult in *Digest*, XXIX. i. 1, at the end.

Further, the soldier (*miles*) is named from *malum* ('the evil') 4 against which he defends his countrymen; or from *millenarius* ('millenary'), according to *Digest*, XXIX. i. 1, at the end, where it is stated also that the army (*exercitus*) derives its name from 'drill' (*exercitium*)— 5 whence Vegetius assumes also that it should never forget from what it is named.[d]

[d] [*Rei Militaris Instituta*, II. i.]

[2] Again, according to Vegetius, the army is nothing else than an aggregation of foot and horse brought together to wage war[e]—which is confirmed by the text of *Digest*, III. ii. 2.

[e] [*Ibid.*, III. i.]

## CHAPTER III

### WARS: WHENCE THEY ARISE

### SYNOPSIS

1 The woes of mankind have sprung from war.

We must assume that wars originated among men either through 1 the infliction or warding off of injury. For, to quote the exordium in a *Consilium* of Paolo di Castro,[f] in that rude age before regulations were established, each individual looked out for his own interests under no regular code, but acting either through the king's forces (if there

[f] I, 399, beginning: *Priusquam iura fierent.*

[1] [Conceiving *duellum* to be derived from *duo* ('two'). But note the same interchange of *du* and *b* in *duonus* and *bonus* ('good').—Tr.]

were a king) or even undertaking war at his own charges—which it was his right to do, both by the divine law and by the natural law and the law of nations. Paolo there develops this idea at greater length. And Baldus[a] held that all the woes of men have sprung from war.

[a] *On Code* VI. i. 1, oppo. 1.

## CHAPTER IV

### KINDS OF WARFARE

### SYNOPSIS

1 War is of three kinds.
2 Wars may be unjust on five grounds.
3 Warfare within and without.
4 Arms of the inner warfare.

1 Baldus[b] declared that wars are of three kinds, namely for offence, for defence, and for the recovery of things lost; and we may suppose that he adopted this division on the analogy of the possessory interdicts, which have to do with acquiring, retaining, and regaining possession. For it was in regard to these that his discussion began in the first place.

[b] *On Code* III. xxxiv. 2, no. 71.

2 Again, a gloss[c] states that on five grounds wars become unjust: (1) from the person concerned, as in the case of a priest; (2) from a circumstance on account of which it is unseemly to wage war; (3) from the occasion, if arbitrary and not urgent; (4) from the purpose and intent, e.g. to requite with vengeance; (5) from lack of authorization. [2′] Baldus also recognizes these five heads[d]; and Hostiensis enumerates 3 seven kinds of war.[e] Panormitanus,[f] however, follows the much simpler course of recognizing but two types, lawful and unlawful.

[c] *On Decretum* II. xxiii. 2, 1.

[d] *Consilia*, V. 439 (*Ad bellum iustum*).
[e] *Summa, De Treuga et Pace*, and *On Sext*, V. iv. 1.[1]
[f] *On Decretals* II. xxiv. 29, col. 3.

There is also outward and inward warfare. It is of the former that I propose to treat. Of the latter it is written: 'Man's life on the earth 4 is a warfare'[g];[2] and we are assured that it is from our lusts that wars arise within us.[h] Soldiers (in this sense of the term) are exhorted by Paul to put on the armour of faith in God, having on the breastplate of righteousness, the shield of faith, the helmet of salvation, and the sword of the spirit.[i] And once again he speaks of that breastplate of faith and love, and of the helmet, the hope of salvation.[j]

[g] *Job*, vii [1].
[h] *Epist. of St. James*, iv [1].
[i] *Ephesians*, vi [11 ff.].
[j] 1 *Thessalonians*, v [8].

However, even this warfare, too, might be called outward; for the same apostle warns us[k] that we wrestle not against flesh and blood, but against the princes and powers of this darkness. But, waiving that point, since it does not concern my present purpose, I shall now consider first with whom rests the right to declare war.

[k] *Ephesians*, vi [12].

[1] [The reference to a commentary on *Sext* is obviously wrong, since Hostiensis (Bl. Henry of Segusio) died in 1271, and the *Liber Sextus* was not issued by Boniface VIII until 1298. Possibly some other commentator was intended, but his name has dropped out of the text.—Ed.]

[2] [The word 'warfare' is made a marginal reading in the King James Version.—Tr.]

## CHAPTER V

### WHO HAVE THE RIGHT TO DECLARE WAR

### SYNOPSIS

1 Any independent ruler may declare war.
2 Venice, the common fatherland.
3 An independent people may declare war.
4 Enslavement and postliminy originated with the law of nations, not in Roman law.
5 A subordinate must consult his lord, and not make war at his own charges.
6 A ruler may not declare war on one who is subordinate to another, unless he first declare the grounds to the overlord.
7 War may be declared in order to punish and avenge injury.
8 Whether prelates may declare war.
9 A ruler, even of lower rank, may make war upon an insurgent vassal of his.
10 'Insurgent' is not the same thing as 'enemy'.
11 Among Christians captives are not enslaved.
12 The law of nations does not apply to brigands.
13 The law of nations does not apply to an insurgent.

[3]

INASMUCH as it has been said above that, in declaring war, authorization is required, it is desirable next to inquire who have the right to declare war.

And without doubt a sovereign has this right. See Innocent[a] and 1
Panormitanus,[b] who find illustrations in the case of the Pope and the Emperor, and the Kings of Spain and France; and there is added[c] a supplementary note assigning this same right to the Duke of Milan, since in his position the last named fills the room of a supreme ruler, and has full powers like the Emperor. This was stated much earlier by Oldradus,[d] who considers the subject at length, and recognizes a distinction between the law of Heaven and the law of the courts.

Under the latter head he differentiates again according as the person who declares war, and the person against whom it is declared, are subordinate or not; and in case there is a superior, he says the latter's permission is required: otherwise the individual may proceed in his own right, because there is lack of an administrator of justice. From the point of view of the law of Heaven, he says that intent and the occasion must be carefully scrutinized—which conveys the hint that a ruler should not undertake such serious business without good warrant.

Bartolus[e] and Baldus[f] declared that the Venetians enjoy this same right; and Fulgosius[g] called the city 'New Rome'. Comensis[h] designates 2
it 'the common fatherland', adding that it is regulated, not by imperial laws, but by a natural justice and self-evolved right. And not without

[a] *On Decretals* II. xiii. 12, el. 1.
[b] *On Decretals* II. xxiv. 29, col. 3.
[c] *Ibid.*
[d] *Consilium* 70.
[e] *On Digest* XLIX. xv. 24.
[f] *On Digest* I. rubric viii.
[g] *Consilium* 62, col. 2.
[h] *Consilium* 72, at end; and again in *Consilium* 140.

warrant we too may call it the crown and glory of Italy; for single-handed, even in the early days, it provided a strong and secure refuge for the people of Italy against barbarian nations and plundering and devastation, and to-day single-handed it preserves and maintains Italian liberty and honour.

3 More briefly, it is my view that any people or nation living under its own laws and at its own charges, and any king or other ruler who is fully independent, may declare war at will and when occasion arises. This was the position taken by Calderinus,[a] and it accords with the view of Cardinal Cajetan.[b]

Throughout the whole first decade of Livy we read that on this basis the Sabines, the Faliscans, the Veientians, the Aequians, the Volscians, the Samnites, the Latins, the Etruscans, the Tarentines, the Lucanians, the Bruttians, the Gauls, and the Ligurians waged war with the Romans; and that the Romans themselves went to war with the Carthaginians, the Achaeans, and the Aetolians, with the kings of Macedon, with Antiochus, and with Mithridates.

Angelus,[c] therefore, is mistaken in his criticism of Bartolus, when he says that if states which [3′] are under no higher authority go to war with one another, their action will provide no basis for the right of enslavement and postliminy, because authorization for making the war is wanting; and, says he, let the man who holds to the contrary cite a law in support of his position. But his instructor Bartolus held this contrary view; and Aretinus[d] also sides against Angelus. But the statement of the latter might be saved if interpreted in the light of what I shall say below in this chapter.

Aretinus, however, goes astray there on another point, when he takes it for granted that the right of postliminy arose only between
4 the Roman people and its enemies;[e] for it is certain that enslavement and postliminy are based on the law of nations itself.[f] And so no one will assume that if an Athenian or Spartan captured by the Persians returned to his people, he did not at once regain his former status (or, in like manner, a Persian who was captured by the Greeks and returned to his own people)—though at that time there were no Roman laws, and perhaps even Rome itself was not yet founded. However, the statement of Aretinus might be saved by saying, as we do of contracts, that though they belong to the law of nations they still belong also, in their formulation and adoption, to the civil law of the Romans; and as is said of the right of possession, which rests directly upon the law of nations, but in its administration falls under civil law. See Bartolus and others.[g] The case could be strengthened by further like considerations.

5 We should know, too, that if the party declaring war is under higher authority, while the person against whom war is declared is

[a] *Consilia*, I, *De Treuga et Pace*, near the beginning.

[b] *Summa*, on word *bellum*, at the beginning, words *Principis autem nomine.*

[c] *Disputations*, beginning *Renovata guerra.*

[d] *On Digest* XXVIII. i. 13, col. 2, words *super secundo.*

[e] On same law words *praeterea dato.*

[f] *Digest*, I. i. 5; *Decretum*, I, i. 9.

[g] *On Dig.* XLI. ii. 1, at the beginning.

independent, the consent of the overlord is still required, as was held not only by Oldradus, but also by Innocent and Panormitanus, in the passages above cited.

And the reason for this is obvious and definite, namely, that the over-lord be not slighted—especially as the matter may concern him very closely, in view of the fact that wars often involve the neighbours, and because a lord is bound to defend his vassal against aggressors, and to protect him from force and injury, as is stated by d'Isernia.[a] And he must fight for the vassal even outside his realm, according to d'Isernia again,[b] with de Afflictis,[c] the latter venturing the stronger statement that if a lord fails to do this he forfeits all his authority—of course, on the assumption that it is not permitted the vassal to precipitate such grave business without consulting the lord.

Baldus,[d] too, states that on three grounds going to war without the knowledge or consent of the lord is not permissible: (1) because the use of arms is forbidden by the laws; (2) because wars are contrary to natural right, unless there is need for defence; and (3) because territory is ravaged which belongs to the lord by right of immediate [4] control. So, says Baldus, if the vassal does not consult the lord, he loses his fief.

Yet Saliceto[e] declares that a subject, without consulting his lord, may make war on a party that is independent. But, in view of what I have said above, I believe this to be an error.

In like manner, it is the duty of one who declares war to appeal 6
to the lord of his adversary. And if this lord stands ready to see justice done on the part of his vassal, there should be no war. For, inasmuch as wars are waged to secure restitution, or to avert or even to avenge injury, what need is there to fight, if justice and satisfaction are offered?

But, lacking this, recourse may be had to the sword. So Hostiensis held,[f] and Bartolus;[g] and this view is supported by *Decretum*, II, xxiii. 2. 2, with a gloss which finds a case in point in the King of England, upon whom war was declared because he refused to see justice done regarding certain law-breaking subjects of his.

And my remark just above that it is permissible to make war to 7
avenge an injury should not seem illogical, though a gloss[h] dissents. For it all depends upon the nature of the injury and the character of the reprisal, since otherwise that would have been an unrighteous war which King David waged against the king of the Ammonites because of the insult offered his envoys.[i]

But if both parties—he who declares war and he upon whom it is declared—are subjects, all the more certainly do we conclude that the lord must previously be notified; otherwise they may incur the guilt of treason, as Calderinus thought.[j] As a matter of fact, if a person wants to chastise his own vassal, who is perhaps rather strong and heady, it

[a] *On Feuds* II. XXIV. i, §*Item qui dominum.*
[b] *On Feuds* I. v. i, col. 1; repeated in chap. i, words *contra omnes.*
[c] No. 38, *On Feuds*, II. XXVIII.
[d] *Consilia*, I, 483, beginning: *Mag. D. Nannus*, no.3.
[e] *On Code* VIII. l. 12 [or 18], penult col., words *si autem e converso.*
[f] *Summa, De Treuga et Pace* (above cited), § *Quid sit iustum*, col.4.
[g] *On Reprisals*, qu. iii, in second main qu.
[h] *On Decretum* II. xxiii. 2. 1.
[i] See *2 Samuel*, x, xi, and xii.
[j] *Consilia*, I, *De Treuga et Pace*, col. 5, words *interdum unus dominus.*

is the more prudent plan to consult the common overlord; see Hostiensis.[a] So Bartolus held,[b] rejecting the contrary view of William de Cuneo. (In this connexion, however, you must take into account what is said in the following paragraph; and understand what has preceded as referring to civil rulers.)

8 As regards ecclesiastical rulers, the case has already been covered so far as the Pope is concerned. With reference to other prelates of lower rank, the Doctors state that it is permissible for them to make
9 war, with the qualifications above noted—and that it even is allowable for them so to proceed against rebellious subordinates, because in such cases they are regarded not so much as waging war but rather as enforcing justice and exercising due authority. So Innocent.[c]

This last, however, seems inconsistent with what I have said in a previous paragraph, quoting the view of Hostiensis and Bartolus—unless one were to say, by way of explanation, that a distinction is to be recognized: (1) There is a call for open force and warlike prowess (perchance on account of the strength of the insurgent), and then the rule of Hostiensis will apply that the lord be consulted, especially if this can be done without inconvenience [4′] (cf. Bartolus[d]); or (2) the issue is one that can be settled without risk of serious warfare, and then the other view finds a place. So Lucas de Penna[e]—and Calderinus,[f] who adds, however, that in this case the superior and the vassal would do better to submit their quarrel to the decision of referees.

Nevertheless—to touch on this detail in passing—it will not be permissible for a prelate himself to participate in the fighting, even when he is in a position to do so—a point noticed by Innocent and Panormitanus.[g] It will not be permissible, I say, for a prelate to join in the battle or to fight, or even to direct his soldiers to slaughter the enemy. He will, however, urge them to acquit themselves like men; but if any member of the clergy, even in a just war, maims or kills a man, his status is lost.

As for my quotation of the remark that he who takes up arms against rebellious vassals is said not so much to wage war as to exercise his right of control, this does not fit with the words of Bartolus,[h] who claims that if the Emperor has declared war upon free states of Italy, say Florence or Venice, these states are counted really enemies of the empire, and persons captured are enslaved.[i]

But since he takes it for granted that these cities are under the empire and a part of the Roman citizenship,[j] I cannot see how they
10 may come to be designated 'enemies'.[k] For 'enemy' and 'rebel' are two very different things, according to the laws cited;[l] and I do not understand how the rights of enslavement and postliminy could here apply (for these are rights which are brought into play in dealings with outsiders, i.e. enemies or foreigners[m]), unless the Emperor shall have

[a] In the above cited section *Quid sit iustum*, col. 1, words *quid ergo*, and the final words.
[b] *On Digest* I. i. 5, qu. 1.
[c] *On Decretals* II. xiii. 12, el. 3; and on II. xxiv. 29.
[d] *On Digest* I. i. 5.
[e] *On Code* XI. xlvii. 1, col. 9.
[f] *Consilium* 1, col. 4.
[g] *On Decretals* II. xiii. 12 and II. xxiv. 29.
[h] *On Digest* XLIX. xv. 24, last col., words *tertio modo indicitur bellum*.
[i] Repeated on *Digest* XXVIII. i. 13.
[j] According to gloss on *Digest* XLIX. xv. 24, where Bartolus, too, comments, cols. 1 and 2.
[k] According to *Dig.* XLIX. xv. 24, and L. xvi. 234.
[l] And tit. *Qui sint rebelles*.
[m] *Dig.* XLIX. xv. 19, near the beginning.

declared the parties 'enemies', as Innocent says[a]—though Bartolus declares[b] that if an insurgent state or people is taken captive, the populace will not become slaves. He cites a gloss,[c] which, however, I think should be understood and qualified in the light of the above statement of Innocent. But beware of taking Venice as an example; for that state is not under the empire, as I have previously pointed out.

As regards the making of war by a subject upon his lord, Calderinus had this to say:[d] The subordinate will do well to endure at the hands of the lord an injury, be it personal (according to the word of the Apostle: 'avenge not yourselves, but give place to wrath'), or be it an injury to property (according to the word: 'if any will sue thee for thy coat, give to him thy cloak also'). But since these directions are admonitory and not imperative, the subordinate may with strict right appeal to the over-lord, or, this failing, to the Bishop. If these measures are ineffective, it will be permissible for him to maintain his cause with arms. Compare what is said on the sole chapter in *Feuds*, Bk. II, tit. XXII, according with the text there, at end.

[5] But though I have noted above that independent states are 11
as free to declare war as are kings and other rulers, yet I do not think (if such should go to war to-day—say, the Venetians against the Florentines) that the rights of enslavement and postliminy would apply to them—although that was the view of Bartolus.[e] For it would be more logical to count this a sort of civil war, in which the rights in question have no place.[f]

Hence Baldus[g] properly declares that the above view of Bartolus is incorrect, and opposes it at length. Against it, too, is a gloss[h] which states that if Faenza and Arezzo make war upon one another, they are not for that reason called enemies (on this see *Code*, VII. xiv. 4, with gloss and comment by Baldus). And there is a bearing on this subject in the further statement of Baldus[i] that if two states go to war, even though it be a just war, captives are not enslaved and hostages do not lose status.

I do not think, however, that Baldus[j] was equally correct in saying that if Saracens and barbarians and other foreign nations which acknowledge neither Emperor nor Pope are at war with one another, the said rights of enslavement and postliminy have no place among them. For I do not see what is to prevent these nations—being free—from taking advantage of the law of nations, which is always operative and belongs to every age.

However, the statement of Baldus might be sustained with 12
reference to a servile war—as when the notorious Spartacus stirred up a war among the slaves in Italy; or when an uprising in Africa was headed by Tacfarinas, the Numidian, during the reign of Tiberius, and by Matho and Spendius against the Carthaginians after the Second

[a] *On Decretals* II. xxiv. 29, cl. 3.
[b] On tit. *Qui sint rebelles*, gloss, word *rebellando*.
[c] *On Authent.* I, near the beginning, word *antiquum*.
[d] *Consilia*, I, col. 5.
[e] *On Digest* XLIX. xv. 24, at end of *Commentary*.
[f] According to *Dig.* XLIX. v. 21.
[g] *On Code* VIII. xlvii. 7, last col.
[h] On word *praedones*, *Dig.* XLIX. xv. 24.
[i] *On Code* I. ii. 1, col. 8, qu. 14.
[j] *On Code* VIII. xlvii. 7, last col.

Punic War. See the accounts in Plutarch in his biography of Marcus Crassus,[a] conqueror of Spartacus; and in Cornelius Tacitus. The latter reports as follows:[b] When Tacfarinas demanded a territory for himself and his army, the Emperor was indignant that a deserter and bandit should claim the privileges of an enemy, whereas not even Spartacus (though devastating an Italy distracted by dangerous[1] wars with Sertorius and Mithridates) was allowed to make terms of surrender.

13 From the above quotation we gather that with this sort of bandits and insurgents or deserters, rights of war and of nations and compacts of peace have no footing; and this will be shown in more detail farther on. In our own age, however, we have known a certain ruler to follow another course in a war he made upon an insurgent who had deserted him, counting himself lucky if matters could be adjusted on the basis of agreement and compact, with gifts and honour for the deserter thrown in!

Add, finally, that if war is declared against a person who shows himself ready to abide by the law and the award of referees touching the matter of complaint, warlike proceedings should be stopped; for war ought to be a court of last resort, as Calderinus has stated.[c]

[a] [viii ff.]

[b] [*Annals*, III. lxxiii.]

[c] *Consilium* I, col. 6, words *et similiter*.

[5]

## CHAPTER VI

### WHO MAY RENDER MILITARY SERVICE, AND WHO NOT

### SYNOPSIS

1 Derivation of the term 'levy' (*delectus*).
2 Nature of the Roman military oath.
3 Men of the decury and of the century.
4 Military brands.
5 Register of the soldiers.
6 Men not entered in the register do not enjoy the privileges of soldiers.
7 Veterans should not be enlisted as recruits.
8 Slaves may not enter the service.
9 Eleven military departments.
10 What are *primicerius*, *secundicerius*, *tertiocerius*, and *quartocerius*.
11 *Primicerii* in every military department.
12 Rating in the departments.
13 New recruits should not be given preference over veterans.
14 Roman soldiers recruited from all nations.

HAVING determined who have the right to declare war, we must now consider who may engage in war. And, by way of preface, it should be stated that when the Roman Empire was in its prime enlistment for service could not be made at random nor according to anyone's caprice; rather, men were chosen (*deligo*) in conformity with

[1] [For *magnas* read *magnis*.—TR.]

certain fixed regulations, whence also the term 'levy' (*delectus*). On 1
this bears a gloss,[a] according to which men to be taken into the service were subjected to an examination. Compare *Code*, XII. xxxiii. 1, where it reads: 'If you desire to enlist, present yourselves to the officers who are commissioned to examine.'

[a] *On Authent.* XVII, penult. section.

They took oath, moreover, to certain things, among others (as the glossator holds) that in the defence of the state they would not shrink from death; compare *Digest*, XL. ix. 31, where another gloss calls for six pledges in the case of the prospective soldier. And that there was 2
another form of this oath is shown by a statement of Livy,[b] who says, 'The soldiers then for the first time took an oath administered by the military tribunes to the effect that they would gather at the call of the consuls and that they would not withdraw without orders. For up to that time there had been nothing but a simple military oath.

[b] XXII [xxxviii].

'And when they had gathered for organization by decury and 3
century—the horse in decuries and the foot in centuries, that is to say, by tens and hundreds—of their own accord they took oath among themselves that they would not retire for fear or flight, and that they would not fall out of line except to secure a weapon, or to strike down an enemy, or [6] to save a citizen. This formulation, developed through voluntary agreement among themselves, was taken up by the tribunes and added to the officially administered oath.' So Livy.[1]

Still another form of oath will be found in Vegetius.[c] For the men swore in the name of God and of Christ and of the Holy Spirit and by the majesty of the Emperor, to whom, says he, loyalty and devotion must be shown as if to God in the flesh; they swore, I say, that they would do with a will whatever the Emperor should order, and that they never would desert the service, or shrink from death in defence of the Roman state.

[c] *Rei Militaris Instituta*, II. v, at the end.

Again, the soldiers were tattooed with certain marks or a brand. 4
See *Code*, XI. x. 3, on which Lucas de Penna says that this marking was called 'belt' (*cingulus*), citing the Archdeacon.[d] But, on the other hand, Accursius[e] explains 'belt' as designating an honour and, in fact, a military rank; and in other places[f] he interprets it as an office; and at still another point he defines: 'belt, i.e. sword', with reference to a word of our times, though from the very text on which he comments it is clear that the reference is to a mark of distinction which the Emperor allowed those to adopt who had completed an honourable term of service. On this see also *Code*, XII. v. 5.

[d] *On Decretum* II. i. 1. 97.
[e] *On Authent.* XLVIII, § 1, gloss, word *cinguli*; and on LXXX. i.
[f] *On Authent.* LXXXII. xiii. and xii; LXXXV. iii, word *sancimus*; and XX, near the beginning.

But the tattoo marks or brands on the soldiers were made by puncture, burning, and staining, as Vegetius records.[g] If this practice were followed to-day, it would be easier to detect deserters.

[g] *Rei Militaris Instituta*, II. v.

Finally, the men were distributed among the divisions of the

[1] [Modern editors arrange and understand this text very differently.—Tr.]

5 soldiers and enrolled in the register. See *Digest*, XLIX. i. 42, where it
6 is stated that even an accepted recruit, already travelling at public expense, if not yet enrolled in a military division,[1] cannot claim a soldier's privileges.

It will not be a case of straggling if we now consider what procedure, and what care and diligence the official regulations required in the enlistment of soldiers. And, first of all, care was taken in selecting and assigning recruits; hence a separate title is devoted to them
7 in the *Code*,[a] where[b] is the Emperor's order that no vagabond or veteran or assessed person be admitted to the status of recruit. (This is noteworthy, as contrasted with the practice of our day, when, on the enlistment of new regiments—commonly called 'groups' or 'companies'—many are enrolled from the membership of other older
8 regiments because of the prospect of new money.) Slaves, too, were forbidden to enlist as recruits, with a penalty of a pound of gold against the recruiting officer.[c]

[a] XII. xliii.
[b] In law 1.

9 There were, moreover, eleven departments in which recruits were trained,[d] some of which are enumerated by Lucas de Penna.[e] Several privileges were theirs, among others that the Counts (these were the heads of departments) might not flog them nor reduce their rating[f]; and further [6′] that after finishing the appointed time of service they should arrive at the rank of *primicerius*.

[c] *Code*, XII. xliii. 2.
[d] According to *Code*, XII. xliii. 3.
[e] *On Code*, rubric, XII. xi.
[f] *Code*, XII. xi. 1.

10 Let me say in passing that there were both *primicerii* and *secundicerii*,[2] and even *tertiocerii* and *quartocerii*. To the *primicerius* belonged the oversight of the secretaries, and the record of all appointments and offices, both military and civil. He looked after the departments and divisions. He had no suite, but an adjutant from the secretarial department. He had special regalia, as you will see in a work of unknown authorship dealing with the civil and military officials of the Romans and appended to the treatise by Alciati. That document Alciati himself calls *A Report to the Emperor Theodosius*; of it I shall have more to say presently.

In the *Code* a special title is devoted to these officials,[g] and Lucas de Penna there says that there were also *primicerii* of the secretaries (not ordinary secretaries, but persons who then served in the imperial court under that name). And there is mention of them also in *Code*, XII. xl. 11.

[g] *Code*, XII. vii.

And since, as I have said, the office of *primicerius* is an advancement of the better kind, it is not strange that there were *primicerii* in every branch of the service. See *Code*, XI. x. 2, on the armourers. And in *Code*, XII. xxiii. 7, the Emperor enumerates many. Furthermore, in *Code*, XII. xxvii. 1, the Emperor speaks of a *primicerius* of surveyors, who, after two years, was transferred to the department of the *agentes in rebus*.

[1] [Probably *numero* should be read for *numeros*.—Tr.] [2] [For *secondicerii* read *secundicerii*.—Ed.]

Of the *primicerius* and *secundicerius*, Joannes Pyrrhus writes as follows:[a] 'The *primicerius* and the *secundicerius* were named from the waxen tablets which they had'; and a little farther along he adds[b]: 'But with regard to the *primicerius* who was at the head of the first division of secretaries, and with regard to the *secundicerius*, note further (as is shown in all good authorities) that the 'first wax' (*prima cera*) was the tablet on which the testator's name was written, the 'second wax' (*secunda cera*) that on which the name of the heir was written.'[1]

[a] Tract. *De Magistratibus Romanis*, Pt. I, no. 32.
[b] *Ibid.*, no. 34.

I find *primicerii* of nearly every department which served under the Emperor. (But I think the term must be understood in a sense far different from the two just quoted; and while frankly confessing that I do not fully understand the force of the word, I still do not hesitate to say that I am not satisfied with the explanation given by Pyrrhus.) That there were *primicerii* in all departments is attested 11
by *Code*, XII. xxiii. 7, § 2 ('the *primicerius* of every department').

Alciati[c] treats of the *primicerius* more lucidly than any other I have consulted, and he quotes words of Cassiodorus[d] by which (as he claims) he demonstrates the honour of that office. But to me these words seem to fit better the count of private affairs or the count of the royal wardrobe, among which officers, too, perhaps *primicerii* were included; for, as I have said, these latter were found in every department. Or perhaps those words of Cassiodorus refer to the count of the privy treasury. (The degree of the dignity and power of this officer is demonstrated by these same [7] words of Cassiodorus, and also by other evidence which I shall supply later, when discussing the count of the private treasury.)

[c] *Commentary* on the three last books of the *Code*.
[d] *Variae*, VI.

Furthermore, the statement of Alciati that the *primicerius* is chief not only among the secretaries but also in other departments does not accord with a passage in the *Code* on armourers,[e] where a *primicerius*, after two years' service, is given a position among the protectors of that same department—which surely must signify an advancement in rank. Compare the *Code* on palace guards and protectors,[f] where a *primicerius*, after reaching the office of tribune, enjoys 'very highly distinguished'[2] dignity in that department. However, Alciati is supported by the text of *Code*, XII. xxix. 2 ('those who, after finishing the term of service, reach the grade of *primicerius*'); so *Code*, XII. xvi. 1 and XII. xxvii. 1.

[e] XI. x. 2.
[f] XII. xvii. 2.

The *primicerii* shared the exemption of counts that, in civil cases, they were answerable only to the directors of the palace guard.[g] Other privileges they had, too; for which see the *Code*.[h]

[g] *Code*, XII. xxix. 1.
[h] XII. xxiii. 7, 10, 13, and 14.

[1] [Horace, *Satires*, II. v. 51 ff. speaks of the names of both testator and heir as being on the first page (*prima cera*). If *primicerius* is derived from *prima cera*, the latter phrase should probably be interpreted 'the top of the page', the *primicerius* heading the list.—Tr.]

[2] [The designation *spectabilis* ('very highly distinguished') indicates a grade below *illustris* ('illustrious'), and above *clarissimus* ('highly distinguished').—Tr.]

12 To resume, there was grading in the military departments, and the new recruits ranked lowest of all. See *Code*, XII. xliii. 3, where a 13 praiseworthy reason for this ruling is advanced, namely that beginners be not put above those whose claims are supported by careful attention to business and by length of service. At the present time, commanders pay little attention to this rule, conferring rank on the basis of a man's birth and family rather than upon his military worth.

14 We should know, further, that in the earlier period men from any nation which was under the empire were enrolled in the army and assigned to divisions, and that on the score of valour and bravery they were advanced to the loftiest and mightiest positions—even to the throne of empire itself, as we read of Maximinus, the Thracian, and Alexander, the Syrian. And in Cornelius Tacitus[a] we are told that the cause of a revolt among the Thracians was that they were unwilling to submit to draft, and to allow all the stoutest men of their nation to be enrolled in the Roman army.

[a] [*Annals*, IV. xlvi. 2.]

[7]

## CHAPTER VII

### WHO ARE EXCUSED FROM MILITARY SERVICE; AND THE TIME OF LIFE APPROPRIATE FOR THIS

### SYNOPSIS

1 Boys are excused from military service.
2 Old men are excused from military service.
3 Boys and old men are not excused in times of great stress.
4 The period of life appropriate for military service.
5 Colonists are excused from military service.

1 Old men and boys do not render military service except in times 2 of urgent need. Thus in Livy[b] we read that the Dictator Cincinnatus ordered all those who were of military age to present themselves; 3 whereas, when the Romans were exerting themselves against Veii and a levy was held, not only were the younger men enrolled, but the older too were compelled to enlist to defend the city[1] meanwhile; and such another order was issued by Camillus, as related by Livy.[c] Also, after the disaster at Cannae, the Dictator Marcus Junius[2] enrolled for service young men of seventeen, and even mere lads, so Livy says.[d]

4 This age of seventeen years was rated by Gaius Gracchus in his laws as sufficing for military service,[e] as well as for legal action. Hence also it is stated in Livy[f] that all were enrolled who had strength

[b] [III. xxvii. 3.]

[c] V [x. 4]; and VI [ii. 6].

[d] XXII [lvii. 9].

[e] [Cf. Plutarch, *Gaius Gracchus*, v.]

[f] XXV. [v. 7 ff.].

[1] [i.e. Rome.—Tr.]

[2] [Belli has *Decius Iunius Dictator*, but Livy has *M. Iunius*, which is probably correct.—Ed.]

sufficient to bear arms, even though they were below the military age; and it was ordered, in the case of those who had entered the service under seventeen years, that their campaigns should be reckoned just as if they were older.[1] In fact, after the above-mentioned disaster at Cannae, those above sixteen years who had not served in that campaign were black-listed, and reduced to the poll-tax class.[2] Thus Livy.[a]

However, it is stated in a gloss[b] that a youth under eighteen years is too young to fight; but the reference is to duelling. Again, an enactment of the Emperor Frederick[c] states that men who are above sixty years and under twenty-five are not bound to serve in person—though this does not fit with the laws of the Lombards, according to which a youth is called a minor only up to the eighteenth year.[d]

Livy records, further,[e] that the colonial coastguard, which enjoyed 5
a formally attested exemption from military service, was nevertheless once forced to enlist; whence, too, we learn that, in case of pressing need, no exemption holds, formally enacted though it be. For necessity knows no law.

[a] XXVII [xi. 15].
[b] *On Feuds*, Bk. II, tit. LIII, chap. i, near the beginning.
[c] *Constitutions* of Frederick beginning: *Consuetudinem*, under title *De qualitate et aetate pugnantium*, at the end.
[d] See *Constitutions* of the same Frederick, beginning *Minorum*, under title *De restitutione minorum*.
[e] XXVII [xxxviii. 3].

## CHAPTER VIII

### WHO MAY NOT RENDER MILITARY SERVICE

### SYNOPSIS

1 Persons of uncertain status are excluded from military service.
2 Traders are excluded from military service.
[8] 3 The clergy are excluded from military service.
4 The weapons of the clergy are prayers and tears.
5 The clergy lose status if they take up arms.
6 At the present time even bishops engage in war.
7 Heretics are excluded from military service.
8 Farmers bound to the soil are excluded from military service.
9 Disreputable persons are excluded from military service.

Men were not excused from military service, but debarred from it, 1
if their status was unsettled—whether they were appealing for freedom from a state of slavery, or, on the contrary, their right to freedom had been called in question. So also those who were ransomed from the enemy and had not yet reimbursed the person advancing the money.[f]

Traders, too, were debarred;[g] as also the clergy, of whom (as of 2
himself) Ambrose declared: 'Soldiers of Christ need no weapons and 3
armour of steel; on the contrary' (says he) 'sadness, weeping, tears, and 4
prayers were my defence against men of war.'[h] Hence it is decreed[1] that if the clergy take up arms with any party whatsoever, they lose 5

[f] *Dig.* XLIX. xvi. 8.
[g] *Code*, XII. xx. 5; XII. xxxiv, entire title.
[h] *Decretum*, II. viii. 23. 3.
[i] *Decretum*, II. viii. 23. 5.

[1] [i.e. final dismissal would come that much earlier.—Tr.]
[2] [For *aerarias* read *aerarios*. This punishment involved serious loss of civic rights.—Tr.]

status.[a] Furthermore, it is said[b] that it is the one business of bishops and soldiers of Christ to give attention to prayer. Yet among generals
6 and leaders of the French we have seen bishops engaging in warfare, and that too in savage and brutal fashion.

7 Heretics, also, were rejected.[c] Likewise persons who attempted to enlist with ulterior motives, e.g., to escape civic responsibilities. So
8 farmers bound to the soil who flee the country districts; courtiers who desert the courts; and slaves who run away from their masters. Likewise persons engaged in litigation, who hoped thus to render themselves more dangerous and costly adversaries. On all these classes see the *Code*[d] and *Digest*.[e]

9 Finally, all disreputable persons were excluded from the service.[f] But there is little point in writing this to-day, when the most vile and debased of all classes of men flock into the service as if to a haven of refuge.

[a] Repeated in *Decretum*, II. viii. 23. 6.
[b] *Decretum*, II. viii. 23. 19.
[c] *Code*, I. v. 8.
[d] XII. xxxiii. 2 and 3, and the whole title.
[e] XLIX. xvi. 4, § 8.
[f] *Dig.* III. ii. 2 § 3; XLIX. xvi. 4, § 7.

[8']

## CHAPTER IX

### ON THE COMMANDING GENERAL

### SYNOPSIS

1 Eunuchs put in command of armies.
2 Narses brought the Lombards into Italy.
3 The office of commander.
4 Leave of absence.
5 Leave of absence is given very sparingly to the soldier.
6 Soldiers at large without leave should be arrested by the governor of a province.
7 Soldiers away from the colours, even on leave, are not counted absent on state service.
8 Xenophon, in the *Cyropaedia*, portrayed an ideal ruler.

THERE need be no query regarding the choosing of a commanding
1 general, since such appointment is made according to the will of the Emperors, who at times have set over Italy and the armies even eunuchs, as in the case of Justinian's appointment of Narses. (This is the Narses who, on the recall of Belisarius by order of the above-named Emperor, put an end to the war, and to the rule of the Ostrogoths in Italy, as described at length by Procopius, private secretary to the aforesaid Belisarius. And yet Narses rendered no great service to Italy
2 or the empire in driving out the Ostrogoths, since he brought in the Lombards, a more cruel and wholly barbarous people, for the purpose of wreaking vengeance upon the Empress,[1] who had boasted that she would reduce him to the carding of wool and house work.)[2] Consequently, rules for selecting a commanding general have little or no utility for us in these days.

[1] [Theodora (d. 548). The story is to be found in Procopius.—ED.]
[2] [i.e., make a woman of him.—TR.]

However, Marcianus[a][1] has written not a little concerning the duty 3
of this officer, stating that it has to do no less with establishing than
with maintaining discipline. Wherefore, he also advises that the
general be very sparing in granting leave of absence, i.e., permission 4
to go away somewhere—this being the sense in which the term is used
throughout the title cited.[b] So good authors employ it; and so in my
native land they commonly use this word (*commeatus*) for the permis-
sion which servants ask of their masters when they want to be away.
But it is found in another meaning in the *Digest*.[c]

And there is no mystery as to the reason why leave of absence 5
should be granted to the soldier very sparingly, namely, that he
should not stray away from his colours and the army. And it is fitting
that leave be granted for only a very short space of time; for it is not
permissible to send a soldier to hunt or fish.[d] Hence in Caesar we read
that he expressed displeasure because companies had gone out to forage
[9] against his orders; for, he said, it was not right to give the enemy
an opening to inflict even the slightest injury.[e][2]

Moreover, it is not allowable, either, that a tribune or even the
commander himself should send soldiers away from the colours to
transact private business for him; and a fine of five pounds of gold was
imposed if he transgressed the rule.[f] In fact, even if for good reason he
sends a soldier to the Emperor himself, the man is directed to present
himself immediately to the court officials, whose business this is, and
to communicate the reasons for his coming, so that he may have early
opportunity to return.

The provincial governors are directed to arrest and imprison 6
soldiers who are at large unlawfully and without leave of absence, and
to notify the Emperor himself, who will indicate what should be done
with them. For both points see the *Code*.[g]

This principle that the soldier should not straggle and stray is so 7
emphasized that even if he is away on leave, he is not regarded as
absent in the service of the state.[h] I am ashamed to confess how this
rule is flouted at the present time, and how unrestricted is the soldier's
licence to be at large—in fact, even to desert and to join the opposing
party. But in those earlier days so much care was exercised that the
soldiers should have to do with nothing excepting arms and warfare,
that they were forbidden to purchase land in the province in which
they were serving, whether in their own name or in that of another,
the idea being to prevent them from neglecting the state's business
through their interest in agriculture. This matter will be treated more
fully later.

Any one who wishes to know more of the duties of a commanding

[a] In *Dig.* XLIX. xvi. 12.

[b] *Dig.* XLIX. xvi; and in *Code*, XII. xvii. 3.

[c] XLVIII. iv. 4.

[d] See *Dig.* XLIX. xvi. 12.

[e] [*Gallic War*, VI. xlii. 1.]

[f] *Code*, XII. xxxv. 13.

[g] *Ibid.*

[h] *Dig.* XLIX. xvi. 1.

[1] [The citation is from Macer rather than from Marcianus.—Tr.]
[2] [The interjection of *hosti* into the sentence here forces the interpretation a little.—Tr.]

general should turn to the jurisconsults Bartholomaeus [Caepolla] of
8 Verona[a] and Lucas de Penna;[b] and to Julius[1] Frontinus,[c] and to Xenophon in the *Cyropaedia*, where, in following the development of a king and general from the very cradle up to old age, he draws an ideal picture rather than a portrait.

[a] Tract. *De Imperatore Militum Deligendo.*
[b] *On Code* XII. xxxv. 11.
[c] *Stratagems*, IV.

## CHAPTER X

### BRANCHES OF THE MILITARY SERVICE; AND ON THE UNARMED OR CIVIL SERVICE

### SYNOPSIS

1 The unarmed or civil service.
2 The armed service.
3 Soldiers of the civil service are not exempt from the dust and toil of the camp.
4 Chamberlains of the Emperors.
5 Secretaries of the Emperors.
6. *Silentiarii.*
7 *Silentiarii*; why so called.
8 Private secretaries.
9 *Silentiarii*, i.e. counsellors of the Emperor.
10 *Silentiarii* are 'very highly distinguished'.[2]
11 *Silentiarii*; the same as the imperial decurions.
12 *Silentiarii* kept the Emperor's night watch.
13 Palace guards. And on these see below, up to No. 16.
[9'] 14 *Protectores.*
15 A *primicerius* at his death passes on to the heir the salary of the current year, and also of the year following.
16 *Praepositus laborum.*[3]
17 Clerks of memorials.
18 Historiographers.
19 Antiquarians.
20 Assistants.
21 *Libellenses.*
22 *Proximi*; and why so called.
23 *Melloproximi.*
24 Accountants.
25 *Actuarii.*
26 *Chartularii.*
27 *Scriniarii.*
28 Antiquarians.
29 *Agentes in rebus.*
30 Directors of the *agentes in rebus.*
31 *Censuales.*
32. *Palatini* of the fiscus.
33 Treasurers.
34 Counts of the treasury.
35 *Palatini* of personal accounts.
36 *Stratores* or *statores*?
37 *Castrensiarii.*
38 *Ministeriani.*
39 *Decani.*
40 *Cornicularii.*
41 Secret police.
42. Measurers.
43. *Metate.*[4]
44 Aides.
45 *Cohortales.*
46 Armourers.
47 Collectors.
48 Pleaders are in this service.
49 Accountants.
50 *Opinatores*, or *opimatores*, or *optiones*? Which is the better reading?
51 Tellers.
52 All who serve in the Emperor's court are said to belong to the military service.

[10]

1 THE military service of the Romans was divided into unarmed or
2 civil service, and armed service. For the Emperor mentions the

[1] [Belli has *Fla. Frōt. de re mil. li. iiij*; but this is probably an error for *Sextus Julius Frontinus, Strategemata.*—ED.]
[2] [See note 2, on page 14.—TR.]
[3] [There is confusion here between *labarum* and *laborum.*—TR.]
[4] [For *Metate* read *Metati*; but see note 2, on page 24.—TR.]

unarmed service in *Code*, XII. xii. 1,[1] and refers to it as 'clerical' in *Code*, XII. xix. 8 and 12; *ibid.*, xxx. 1, where it is stated, further, that those are no strangers to the dust and labour of the camp who attend the Emperor's standards, and who undergo multiplicity of travels and the hardships of campaigns. This unarmed service, again, is subdivided into almost innumerable classes, some of which I shall review. 3

And, among the first, I mention the Emperor's chamberlains[a], along with the secretaries.[b] (But these last I would not have you identify with the persons we commonly call 'secretaries'[c], as I have already indicated above.) 4 5

Add the *silentiarii*, a name which I should fancy derived from the word 'silence' (*silentium*), just as we call those 'private secretaries' (*secretarii*) who handle the confidential business (*secreta*) of their masters.[d] 6 7 8

Accursius,[e] however, claims that they all are counsellors of the Emperor, and the Doctors generally agree.[f] But if that were the fact, they would be rated as 'highly distinguished' and not as 'very highly distinguished'.[g2] 9

These *silentiarii*, after a continuous service of thirteen years, gain even 'illustrious' senatorial dignity.[h] Moreover, the Emperor refers to the *silentiarii* as 'very highly distinguished' in *Code*, XII, xxviii. 30, § 3, where Accursius is of the opinion that they are private secretaries. 10

In the rubric and text of *Code*, XII. xvi, they are classed with the Emperor's decurions; and, after finishing their service, they were rated among the 'illustrious';[i] and they enjoyed other distinctions[j]. This, however, applies only to thirty *silentiarii* and three decurions[k], and that too if they have served on the night watch thirty years (another reading has thirteen years). Hence I am led to think that their duties had to do with keeping watch over the Emperor. But Alciati says that they are officials concerned with maintaining silence in the palace. 11 12

Next we add the palace guards and *protectores*.[l] There was a department of each of these, headed by a *primicerius* and a tribune,[m] who were 'very highly distinguished' like military commanders. The others following them, up to the number of ten, are called 'highly distinguished', and thus are on a par with governors.[n] 13 14

[10′] What the palace guards are, and what the *protectores*, is set forth by Lucas de Penna,[o] the palace guard comprising those who serve the Emperor with no other special name or title. Alciati, however, thinks that they were persons who handled the Emperor's confidential business, while the *protectores* guarded his person—both ideas being derived from the etymology of the names. That they served in the cavalry division he shows by *Code*, XII. xvii. 4, where it is further 15

[a] *Code*, XII. v. 2, 4 and 5.
[b] *Code*, XII. vii. 1 and 2.
[c] Following Lucas de Penna on *Code*, rubric, XII. vii, and on *Code* XI. liv. 1.
[d] *Code*, XII. xvi. 5.
[e] *On Code*, rubric, XII. xvi.
[f] *On Code* V. lxii. 25.
[g] See text *ibid.*
[h] *Code*, XII. xvi. 1 and 3, §4.
[i] *Code*, XII. xvi. 1.
[j] See *Code* XII. xvi. 2 and 3.
[k] Law 3, just cited.
[l] *Code*, XII. xvii. 4, and the whole title.
[m] *Code*, XII. xvii. 2.
[n] *Ibid.*, 1.
[o] *On Code*, rubric, XII. xvii.

[1] [Apparently a false reference.—Tr.]

[2] [See page 14, note 2.—Tr.]

ordered that if a man, who has risen to the rank of *secundicerius* and who is looking forward to the office of *primicerius* for the following year, is pre-empted by death, his heir shall be the recipient of the salary and the emoluments even of the service as *primicerius* in prospect for the following year.

However, the Doctors generally interpret this law differently, assuming that it was one and the same office that the individual was holding and to which he was looking forward in the following year. And they assume that there is an anomaly in this case, in that the heir receives the salary not merely of the year begun (which is seen, too, in *Digest*, I. xxii. 4), but also of the following year, which is nowhere found in written law, except in the above passage.

I have an idea that there were *protectores* in many departments, counting it a general official title, and not a specific term. This is gathered from *Code*, XI. x. 2, where the Emperor promotes a *primicerius* of the armourers, after two years of service, to a position among the *protectores* of that division. However, the Doctors there interpret far differently.

In a letter[a] to one of these *protectores*—if the document be authentic—St. Jerome writes, exhorting him to spurn worldly military service and to enter the service of Christ, saying: 'You who are a protector of others, shall begin to have a protector in Christ.' Accordingly the name was given in recognition of fact; just as we learn in regard to 'defender' in *Code*, I. lv. 5.

[a] Beginning: *Etsi ignotus tibi sim facie.*

The palace guard was constituted, not on the basis of a count's selection, but on the basis of rating in the army and service of five years.[b]

[b] *Code*, XII. xxix. 1, near end.

16 To this civil service belonged also the *praepositi laborum*,[1] perhaps so named because they were made by the Emperor to be participants in his cares and toils, being such as the Pope to-day names cardinals, though Lucas de Penna explains otherwise.[c] But I would not have you think that they are put on a level with cardinals; for they are merely 'highly distinguished'.[d2]

[c] *On Code*, rubric, XII. xviii.[a]

[d] *Code*, XII. xviii. 1.

17 Add also the clerks of memorials and other imperial documents,[e]
18
19 all of whom had special titles and ranks and positions. For they were
20 known variously as historiographers, antiquarians, assistants,[3] *libellenses*,
21
22 *proximi*, and *melloproximi*.[f]

[e] *Code*, XII. xix. 2 and 3.

[f] *Code*, XII. xix. 14 and 7.

23 Alciati declares that the *melloproximi* are next in rank to the *proximi*, and offers no further explanation. And although Accursius[g] thinks that the *proximi* were so named because they stand close to the Emperor, we must assume, however, [11] that the name designates a service; for those who served two years in the secretarial department attained the rank of *proximi*; afterward this period was shortened to one year.[h]

[g] *On Code*, rubric, XII. xix.

[h] *Code*, XII. xix. 6.

[1] [There is confusion here between *laborum* and *labarum*.—Tr.]

[2] [Cf. page 14, note 2.—Tr.]

[3] [Supply *alii*.—Ed.]

They are rated with the deputies of governors and with military commanders;[a] and at the end of their period of service they rank with cabinet officers,[b] having attained no special distinction; for the private business of the Emperor (see reference) is put into their hands—which indicates what the nature of their office was.

[a] *Code*, XII. xix. 1.
[b] *Code*, XII. xix. 8.

And other titles were not wanting: *numerarii*, *actuarii*, *chartularii*, 24 25
*scriniarii* (also called *exceptores*), and antiquarians. The last-mentioned 26
collected items of antiquarian interest for the sovereign, as it is written 27 28
in the Book of *Esther*[c] that Artaxerxes (otherwise Ahasuerus), being unable to sleep, ordered records of the chronicles to be read to him. And benefit resulted therefrom to Mordecai.

[c] [vi. 1.]

The duties of all the above I think were very similar, though they are listed under different headings, the first under the rubric of *Code*, XII. xix, and the others under that of *Code*, XII. xlix. And a person would not go far astray, if he included them even in the armed service; for it is of them that Vegetius[d] has this to say: 'Moreover, in the case of certain soldiers ability to write and experience in accounting is required. For a record of the whole legion (both of the camp followers, and of the fighting men, and of the moneys) is daily entered in the books.' And from these records (*acta*) and accounts (*numeri*), he says, the men acquire the names *actuarii* and *numerarii*.

[d] *Rei Militaris Instituta*, II. xix.

They kept a record, too, of the night watch and outpost duty[1] which the soldiers perform in turn by centuries (in order that none be burdened more than others). Likewise they recorded the names of those who had performed their part, or service (as we say to-day), making note of the leaves of absence granted to the men, to prevent them from straying at will—these leaves of absence being allowed only for very good and sufficient reasons. Thus Vegetius.

As for assistants, you will find them listed among the 'highly distinguished'.[e] How many of them there should be in the court secretarial service is stated in *Code*, XII. xix. 13 and 15, § 5; where you will observe also to which of them it is allowed to nominate others in their room.

[e] *Code*, XII. xix. 12, § 3.

To the service, too, must be reckoned the *agentes in rebus*, whom 29
Lucas de Penna[f] held to be officials who presided over public business entrusted to them. These also have distinctive titles, number, and honour.[g] And much more must be counted in the military service the 30
directors of these *agentes in rebus*;[h] so also their chief.[i]

[f] *On Code*, rubric, XII. xx.
[g] *Code*, XII. xx. 2, 3, and 4.
[h] *Code*, XII. xx. 5.
[i] *Code*, XII. xxi. 4, 5, and 6.

It was a prerogative of theirs that no military person could be forced to appear in court without this chief's warrant, and that pleaders of cases should not bring action against any one either, without consulting him.[j] [**11**′] And all summonses, issued against any one whomsoever, even were the person of senatorial rank, had to be handled by these

[j] *Code*, XII. xxi. 1.

[1] [For *angarias* read *agrarias*.—Tr.]

31 chiefs; though other business might be carried through by the *censuales*. So it is ordered in *Code*, XII. xxi. 2, though Alciati interprets otherwise.

These chiefs, finally, receive marks of distinction when they have begun[1] to be numbered among the honourables, being rated with the vicegerents. (This favour was shown also to assistants—not to all, but to those who had served under the *magister officiorum*.[a]) The service of the *exceptores* was different from that of these chiefs, and even more honourable, as we gather from *Code*, XII. xxiii. 5. And regarding the duties and rating of all these persons see *Code*, XII. xxiii. 7.

[a] *Code*, XII. xxi. 5.

32 Add also the *palatini* of the fiscus, among whom were numbered
33 treasurers, counts of the treasury, and their staffs.[b] These too were
34 differentiated in rank, number, dignity, and title.[c] Again, the *palatini*
35 of the Emperor's personal accounts belonged to the service.[d]

[b] *Code*, XII. xxiii. 2.
[c] *Code*, XII. xxiii. 7.
[d] *Code*, XII. xxiii. 14.

36 The same is true of the *stratores*—in the explanation of whose functions a gloss and Lucas de Penna[e] become involved in difficulties; and the same is true of another gloss.[f] But we should read rather *stratores*—persons whose business differed little from that of couriers or messengers, such as to-day we designate 'court bailiffs', and who serve summonses by order of the judge. Cicero speaks of them in a certain letter to Appius.[g2] And the glossator on *Digest*, I. xvi. 4,[h] identifies them with what are commonly called 'orderlies', a service much like the one I have mentioned.

[e] *On Code*, rubric, XII. xxiv.
[f] *On Dig.* IV. vi. 10, near the beginning.
[g] *Letters to Friends* [II. xvii. 1].
[h] Near the beginning, 2nd gloss.

However, Accursius is wrong in assuming that the above-mentioned law prohibits the use of *stratores*, while *Code*, XII. xxiv. 1, allows it. For in that first cited law[i] the proconsul is forbidden, not to have *stratores*,[3] but to maintain special *stratores*; and he is directed to utilize[4] the service of his soldiers in this capacity. (Yet a large proportion of the soldiers are forbidden to allow themselves to be sent into the province of their birth or in which they have established a home, with a view to executing a commission there, being liable to expulsion from the army if this rule is violated.[j])

[i] *Dig.* I. xvi. 4.
[j] *Code*, XII. lix. 3.

On the other hand, Alciati thinks we should read *stratores*, persons who, he says, have charge of paving the roads. Or, he thinks the word may stand for 'letter carriers', whom he judges to differ little from mounted couriers, commonly called 'the Emperor's riders', to whom he says horses must be supplied successively by the provincials to expedite their journey.

37 In the service there were also *castrensiarii* and *ministeriani*,[k] a
38 term which Alciati explains, understanding it of soldiers assigned to service at court. And from among them, as I think, was drawn another

[k] On these see *Code* XII. xxv. 3.

[1] [For *ceperint* read *coeperint*.—Tr.]
[2] [This letter, however, is not addressed to Appius.—Tr.]
[3] [Not *stratores*, but *stratores* (as if from *sterno*, 'cover').—Tr.]
[4] [The difficult reading here is illuminated by the wording of the *Digest* (*vice eorum milites ministerio in provinciis funguntur*).—Tr.]

class of soldiers whom the Emperor calls *decani* (as commanders of ten) 39
and *primicerii*,[a] [12] or perhaps they were officers of the *ministeriani*,
and not a separate division. According to Vegetius,[b] *decanus* is another
name for 'head of the mess', representing the command of ten men.

Add also the *cornicularii*, which I take to be a general term for[1] 40
'adjutant', as Alciati states. Perhaps they were identical with the
trumpeters. For in the army there were those who blew signals upon
the straight, the curved, and the crooked horn; and while the functions
and duties of all these seem very similar, as a matter of fact they differ
in certain particulars; see Vegetius.[c] Others say that *cornicularius* is a
rank in the service; so Asconius. Still others, among them Maternus,
hold that the duties of a *cornicularius* were secretarial, and concerned
chiefly with writing out judgements against the condemned.

There were also secret police, whose business it was to ferret out 41
and report crime, perhaps without regard to the place where com-
mitted, as held by Accursius, or crimes committed at court only, as
Alciati thought. Likewise, too, perhaps these secret police were
otherwise designated as 'roundsmen'—who also are mentioned in the
laws. They are called *circitores* by syncope for *circuitores*. The tribunes,
says Vegetius,[d] select suitable and thoroughly trusty men to inspect
(*circumire*) the watch, and to report any infraction of the rules during
the day among the soldiers, especially within the lines. It is called
'making the rounds'.

Again there were 'measurers' (*mensores*), whether persons to survey 42
the site for camps (called also *metati*),[e2] or to measure timber and 43
provisions, as was held by a gloss[f] which Lucas de Penna follows.

The sounder view, however, is that it is the business of the *metator*
to go on in advance of the army and to choose a place for a camp,
which to-day is the special function of the camp and army director, as
we say; whereas the 'measurers' (*mensores*), after the camp site was
reached, marked off[3] with the foot-rule where the soldiers were to set
up the tents; and in towns they assigned and secured billets for them—
a business which to-day falls to the officer commonly known as
'quartermaster-general'.

These, too, had a *primicerius* of their own; and they ranked one
degree below the *agentes in rebus*;[g] for their *primicerius*, after two years'
service, begins the service of an *agens in rebus*.[h] And they mounted up
to the highest honours in due order, not by leaps and bounds, as we
see done in these days.

Among the soldiers are numbered also the aids of the city prefect 44
and the praetorian prefect; so too of the military chief, governor,

[a] *Code*, XII. xxvi, 1 and 2.
[b] *Rei Militaris Instituta*, II. viii, and xiii, near end.
[c] *Rei Militaris Instituta*, II. vii, and III. viii.
[d] *Ibid.*, III. viii.
[e] *Code*, XII. xl.
[f] *On Code*, rubric, XII. xxvii.
[g] See *Code*, XII. xxvii. 1.
[h] *Ibid.*

[1] [For *qui* read *quod*.—Tr.]
[2] [This is an error, due apparently to assuming a nominative *metati* from the ablative *metatis*, or from the genetive. As a matter of fact, the nominative plural is *metata*, 'quarters' (*Code*, XII. xl.)—Tr.]
[3] [For *dometiebantur* read *dimetiebantur*.—Tr.]

lieutenant-governor, and count of the Orient. Each group has special titles devoted to them in the Code.[a] Add also the aids of the provincial officials; for whom see *Code*, XII. lvii. 7, where mention is made also of the aid of the food administrator—an office at one time conferred by the Emperor Alexander upon the famous jurisconsult Ulpian, who subsequently advanced from this administration to the office of praetorian prefect, as is shown by *Code*, VIII. xxxvii. 4, and IV. lxv. 4. In the first of these citations [12′] the Emperor refers to him as 'friend', in the other as 'parent'. (In the place of a food administrator, our military commanders in these days appoint a commissary general.)

[a] [XII. lii ff.]

45 *Cohortales*, however (to touch on this matter in passing), are forbidden all other forms of service. So *Code* XII. lvii. 12; from which passage, near the beginning, we may infer that their name is derived from the word 'cohort' (*cohors*), though a glossator[b] declares that the *cohortales* are so named because they are more closely crowded (*coarctari*) than the *curiales*, repeating the same on the rubric of *Code*, XII. lvii. He showed better understanding where he says[c] that the name is derived from *curia* ('court'), or from *cohors* ('cohort').

[b] *On Code* III. xxiii. 2.

[c] Gloss on *Code* III. xxiii. 1, word *militare*.

According to Alciati, the *cohortales* were so named from being assigned to a cohort; or because they collected tribute by cohorts, as Joannes Pyrrhus understood it. But Alciati is better supported by *Code*, XII. lvii. 4.

That their duties had to do with clerical and secretarial matters may be assumed from *Code*, XII. lvii. 10 and 14. But there is nothing against supposing their organization into cohorts. That their service was exacting is implied by *Code*, XII. lvii. 12, where it is stated that their term is not complete short of service in thirty campaigns. And it is said that their lot involves that of their sons, so that they resemble farmers bound to the soil. Hence also it may be assumed that theirs was a special service, with a chief, a first centurion, and other officers.[d]

[d] *Code*, XII. lvii. 13.

To the service belonged also transportation agents[e]—perhaps persons who shipped food or clothing or anything else needed for the Emperor's use. (For *βαστάζω* in Greek is what *porto* ('transport') is in Latin, which also is gathered from *Code*, XI. viii. 8.)

[e] *Code*, XI. viii. 8.

46 In the service, too, were the armourers,[f] to whom belonged the making and oversight of arms.[g] They had *primicerii* and *protectores*, which are titles representing office and dignity, as I have already said.

[f] *Code*, XI. x. 3 and 4.

[g] *Code*, XI. x. 1.

47 The laws class as soldiers also the *exsecutores* and collectors.[h]

[h] *Code*, XII. lx. 3 and 6.

48 Furthermore, the Emperor declared the very court advocates and pleaders of cases to be in the service.[i] This will cause less surprise to one who[1] will consult *Code*, XII. xii. 1, where even the physicians of the imperial court are said to be in the service, and they are ranked in dignity with vicegerents and generals who have held actual commands

[i] *Code*, II. vii. 14.

[1] [For *quod* read *qui*.—Tr.]

—provided, however, that they have won a place among the counts of first rank. And no wrong is done in honouring those who watch over the health and very life of the Emperor, indeed they are rated even with counts who have governed provinces, as you will see, if you read *Code*, XII. xiii. 1, in connexion with the law that next follows.

[a] *Code*, XII. xlix. 3.
[b] *Code*, XII. xlix. 1.
[c] *Ibid.*

To the service belonged also accountants.[a] The Emperor, however, declared[b] that their administration was rapacious and dishonest; and so he ordered that they should not be exempt from examination under torture, if occasion should arise.[c] The nature of their office and business is set forth in *Code*, XII. xlix. 2, where they are changed [13] in status and name to *tabularii*. They had charge also of the imperial treasury in the provinces and of the fiscal revenues.[d] 49

[d] *Code*, XII. xlix. 4.
[e] For these see *Code*, X. xix. 7; XII. xxxvii. 9 and 11.
[f] See his tract. *De Magistratibus Romanis*, Pt. 1, at end.

Add also the *opinatores*, who[1] were collectors of army rations.[e] However, Joannes Pyrrhus corrects to *opimatores*—persons whose business it is to see that the camp is well fed (*opimus*), commonly called 'victuallers'.[f] And Haloander emends the text of the cited laws—'*optiones*, not *opinatores*', influenced perhaps by *Code*, X. xxii. 3, where, among the 'collectors', *optio* is listed as of masculine gender. 50

Probably the first reading, *opinatores*, is the best, connoting either 'collectors' or those persons who pass upon estates that have to be appraised, as we gather from *Code*, XI. iii. 3 ('according to the rating of the land', i.e. according to the assessor's estimate, as Accursius there explains). The name is perhaps derived from the fact that they put upon estates the estimate which they think (*opinor*) right.

Moreover, Alciati says that the *optiones* who move on in advance of a sick soldier to fight for him are named from the verb *coopto* ('to substitute')—an idea which he drew from Vegetius. 'Optiones', says the latter,[g] 'are named from the verb *opto* ('to choose'), because in case the officers previously mentioned[2] are incapacitated by illness, the *optiones* take over all their business, as being their chosen substitutes.'

[g] *Rei Militaris Instituta*, II. vii.

Mention is made of *optiones* in *Code*, X. i. 9; but from this passage we hardly gather what their duties were. That they might be collectors is shown by *Code*, X. xix. 7, if we follow Haloander. Clearer evidence is found in *Code*, X. xxii. 3, and XII. xxxvii. 11, the latter citation seeming to show that they received the money collected from the provincials, not directly from the contributors, but from the hands of the governors themselves and from the provincial staff. They are mentioned again in *Code*, XII. xxxviii. 1, but in both these passages the reading in the common texts is *opinator*, and not *optio*, as corrected by Haloander, whose position is much weakened by the words of Vegetius above quoted.

[1] [*ii.* probably for *ei.*—Tr.]
[2] [Namely, tribune, standard-bearer, &c. Alciati's interpretation ignores the context and strangely perverts *antecedentibus*.—Tr.]

To continue, the *opinatores* referred to in *Code*, XII. xxxviii. 1, made collection for a person's family even when he had none, or rather they made collection for families that had died out and disappeared, burdening other provincials in their name. But they did not collect from exempt persons, as Accursius explains; though in *Code*, XII. xxxviii. 2, all exemption is forbidden, even of the household of the Empress.

There is further mention of *optiones*, but in another sense, in *Code*, IV. lxv. 35 ('under the different *optiones* of the allies')[1]; and in the *Authenticum*, cxvi[a]: 'that they send the allies to the proper[2] *optiones*'. These two last passages show that the Roman soldiers were classified in appropriate divisions, and the allies in proper *optiones*.

[a] § *Scientibus*.

51 In the civil service there were also tellers, i.e. special receivers, as they are called to-day, such as tribunes (otherwise, chiefs) of the treasury.

52 [13'] And, to bring to a close at length this catalogue of civilian soldiery, all are said to be soldiers who labour and serve in the imperial palace.[b] There will be more particular mention of many others in the following chapter, in the review of the grades and titles of the armed soldiery.

[b] See *Code*, XII. xxviii, entire title.

## CHAPTER XI

### ON SOLDIERS OF THE ARMED SERVICE

### SYNOPSIS

1 The common soldier.
2 Tribune.
3 Centurion.
4 *Ducenarii*.
5 Company of soldiers.
6 'Spearmen'.
7 Maniples.
8 Light armed foot-soldiers.
9 Leaders.
10 'Ante-javelin' troops.
11 First javelins.
12 Division.
13 'Third line' men.
14 Skirmishers.
15 Reserves.

After reviewing so many soldiers of the civil service, it is my pleasure to consider some belonging to the armed service; though I am well aware that not a few of those already considered should have been classified in this second division, while many to be mentioned here

[1] [A misinterpretation of the clause: *sub diversis optionibus foederatorum nomine sunt decorati*. Manifestly *foederatorum* modifies *nomine*, and not *optionibus* (masculine).—Tr.]

[2] [For *proprias* of this text, the original has *proprios* (masculine). Neither citation gives any support to the conclusion which Belli proceeds to draw. In both passages *optio* designates an officer, and not a division.—Tr.]

might have been included in the first division. This subject I shall take up from rather early times.

When the Roman commonwealth was in its prime and mistress of the world, provinces were assigned by lot to consuls, proconsuls, praetors, and propraetors, and these officers commanded armies. Scarcely will you find any others sent into provinces with the military imperium.

And when the government merged into a monarchy, Augustus introduced few changes; and the same is true of the others who occupied the throne after him, even up to Hadrian's time. The latter introduced many innovations; and, after him, Diocletian and Maximian[1] added far more; for where abuses are rife laws and punishments abound.

[14] After Constantinople was made the new Rome, and the seat of government was transferred to foreign soil, and, in the period before the Gothic and other barbarian invasions, the world as a whole was divided into districts and provinces, with gradations among the civil and military directors, crown officers, and their staffs. This subject you will find very fully treated in a certain anonymous work which Alciati published. He himself calls it *A Report to Theodosius.*[a]

[a] Following his own tract. *De Magistratibus Civilibusque et Militaribus Officiis.*

The titles and grades of the armed service are not mentioned with equal detail in the laws. But there is reference to the common soldier, which is the lowest grade of all;[b] and *Digest*, III. ii. 2, speaks of the tribune, the centurion, this same common soldier, and other grades. 1

[b] In *Code*, V. iv. 21.

Vegetius declared that the word 'tribune' is derived from 'tribe' (*tribus*),[c] and from administering justice (*ius tribuere*); also that one of their number was a 'senior' officially appointed by the Emperor, while the others won promotion by their own exertions. 2

[c] [*Rei Militaris Instituta*, II. vii, at the beginning.]

The centurions were officers who commanded centuries, and for that reason by others they have been called *centenarii* ('commanders of hundreds'). There is mention in many laws of *ducenarii*, who, I fancy, either commanded two hundred men, or themselves formed a body of two hundred in their department or class. Furthermore, Vegetius has this to say of the *ducenarius*: 'The ranking centurion of the third maniple[2] used to command two centuries, i.e. two hundred men. At the present time,' he adds, 'the name is *ducenarius*.'[d] 3 4

[d] [*Ibid.*, II. viii, at the beginning.]

Such a point concerns little a legal treatise; and yet I cannot bring my mind to pass without mention the manner in which the Romans—at the time when state[3] and army were at their best—classified their soldiers, according to the account given by Livy.[e]

[e] VIII [viii. 4 ff.].

Roman soldiers, he says, were arranged in numerous companies,[4] 5

[1] [For *Maximilianus* read *Maximianus*.—Ed.]

[2] [This is the meaning of *prior hastatus* in Caesar's time. Vegetius perhaps has something different in mind.—Tr.]

[3] [For *respublicae* read *respublica*.—Tr.]

[4] [This difficult passage from Livy is much confused here. See a good text with notes.—Tr.]

each company having sixty men, two centurions, and one colour-bearer.

6 The first line of a legion in battle array consisted of 'spear-men',
7 fifteen maniples, stationed with short spaces between. (A maniple included twenty light-armed men, the remainder heavy-armed. Those
8 were called 'light-armed' who carried only spear and javelins.[1]) This first line was made up of the very young men.

Behind these were ranged a like number of maniples of men of
9 sturdier age, who were called 'leaders'.[2] All thus far mentioned were provided with shields and resplendent arms, making together thirty
10 maniples; they were called the 'ante-javelin' troops.[3]

In a third line under the standards, another fifteen companies were stationed, each of which was made up of three divisions, the
11 first[4] of which in each case they called 'first javelins'. The company[5]
12 made up of the three divisions numbered one hundred and eighty-three men.

13 The first division was called 'third-line men'—a veteran soldiery
14 of tried valour; the second they called 'skirmishers', and the third
15 'reserves' (*accensi*)—soldiers of little reliability, who were relegated to the rear of the line.

Joannes Pyrrhus makes mention of *accensi* in a treatise of his[a] which came to my hand after the completion of this work of mine, whatever be its merit. But he offers no explanation, and simply refers to his *Commentary on Three Books of the Code*,[b] [**14**'] which it has not been my good fortune to see. (Following the army as I do, I have had no leisure or opportunity to get together a fuller bibliography, my destiny calling me to follow now these rulers and commanders, and now others, and, as the poet has it, to live under another's auspices rather than under my own.[c]) Alciati, however, says they are servants of a higher magistrate, as it were 'added to the roll'. But neither of these writers cites the above passage from Livy.

[a] *De Magistratibus Romanis*, Pt. I, no. 5.

[b] [*On Code* XII. lv].

[c] [Virgil, *Aeneid* IV. 340 ff.]

The 'spearmen' (*hastati*) were first of all to enter battle.

Again, at another point Livy says that *primipilus* is the designation of the first centurion.[d] Joannes Pyrrhus held[e] that the *primipilus* was commander of a legion, either of the tenth legion, which was most distinguished, or of the first, as he is more inclined to think. But that this was not the case is clear from Livy, and also from Caesar.

[d] VII [xli. 5].

[e] *De Magistratibus Romanis*, Pt. III, no. 7.

The latter says:[f] 'Titus Balventius, who had commanded the first maniple of the first cohort the year before—a brave man, of large influence—had both thighs pierced by a dart; Quintus Lucanius, an

[f] *Gallic War*, V [xxxv. 5 ff.].

[1] [*gessa*, i.e., *gaesa* or *gesa*.—Tr.]
[2] [A name given them at an earlier time, when the troops were drawn up in a different order.—Tr.]
[3] [So named from the equipment of the troops behind them.—Tr.]
[4] [The reading in Livy is very uncertain.—Tr.]
[5] [Modern texts at this point omit *vexillum*; and *ordo* is carried on as subject.—Tr.]

officer of the same rank was killed.' Again, he relates:[a] 'Lucius[1] Pupius, a centurion of the first maniple of the first cohort was brought in—a man who previously had held the same rank in the army of Gnaeus Pompey.' Furthermore he adds:[b] 'When the shield of Scaeva,[2] a centurion, was brought to Caesar, two hundred and thirty punctures[3] were found in it, and he promoted the man from the eighth cohort to the command of the first maniple of the first cohort.' And once again:[c] 'There was in Caesar's army a re-enlisted man, named Crastinus, who had commanded the first maniple of the first cohort of the tenth legion the year before.'

[a] *Civil War*, I [xiii. 4].

[b] *Civil War*, III [liii. 4 ff.].

[c] *Ibid.* [xci. 1].

Now why need he have specified 'in the tenth legion', if that alone had a *primipilus*? Even Pyrrhus seems to have felt this, in view of what he there says; for he also cites this passage from Caesar regarding Crastinus, the re-enlisted man.

To touch on the matter parenthetically, I hold that re-enlisted men (*evocati*) were soldiers of great courage and large experience, who, after release from service, were recalled to the colours by their generals, under stress of urgent need. For example, we read of this same Crastinus:[d] 'To his men he shouted, "You who were once my comrades-in-arms, follow me." '

[d] *Ibid.* [xci. 2].

Caesar further says[e] 'because men who had been tested in previous wars were called out (*evocari*) to command armies'; and in the same book he states:[f] 'Of the senatorial order there were present Lucius Domitius and Publius Lentulus, Vibullius[4] Rufus, Sextus Quintilius, and Lucius Rubrius; also the son of Domitius,[5] and several other young men, and a large number of Roman knights and municipal senators, whom Domitius had summoned (*evocare*) from the towns.'

[e] *Civil War*, I [lxxxv. 9].

[f] *Ibid.* [xxiii. 2].

Again, in the same book[g] it is stated that Caesar had sent legions ahead into Spain, with auxiliary foot soldiers to the number of six thousand[6] and cavalry to the number of three thousand, with an equal number from Gaul, whom he himself had enlisted, summoning (*evocare*) by name[7] all the most distinguished men from every state. Pyrrhus, however, in the above reference does not understand the matter in this way.

[g] *Ibid.* [xxxix. 2].

Under the Emperors, not a little is added to the responsibilities of the first centurion, as is shown by the laws, which demanded that even a wife's dower be liable to confiscation for the debts of a *primipilus*.[h] [15] The sons also were liable for his debts to the extent that they might

[h] *Code*, VIII. xiv. 4; XII. lxii. 3; and comments on V. xvi. 15.

[1] [For *l.* read *L(ucius)*.—Tr.]

[2] [For *Sænæ* read *Scævæ*.—Ed.]

[3] [One hundred and twenty is the number given by Caesar.—Tr.]

[4] [The MS. reading *Caecilius* is usually retained (as against *Vibullius*).—Tr.]

[5] [This is Gnaeus Domitius Ahenobarbus, who was one of the party of Brutus and Cassius, and was later among those accused of the murder of Caesar. The second and fourth of the names listed in this quotation are given in René Du Pontet's text (Oxford, 1901), and in A. G. Peskett's Loeb Library text (London and New York, 1914), as P. Lentulus Spinther, and Sex. Quintilius Varus quaestor.—Ed.]

[6] [This numeral is doubtful.—Tr.]

[7] [For *nominanti* read *nominatim*.—Tr.]

not decline to accept inheritance from the father; or at any rate, even in case they declined,[1] they were compelled to pay the father's debts.[a]

From this we are justified in supposing that, by virtue of the nature of his office, a *primipilus* handled public funds—perhaps the money which was appropriated for the pay of the soldiers under him. This agrees rather closely with the comments which Alciati[b] made upon the *primipilus*, drawing his material from Vegetius,[c] in whose writings you will find extensive information regarding the dignity and the duties of this officer.

[a] *Code*, XII. lxii. 4.

[b] *On Code*, XII. lxii.

[c] *Rei Militaris Instituta*, II. viii.

## CHAPTER XII

### ON THE PRAETORIAN PREFECT

### SYNOPSIS

1 Praetorian prefect of the Orient.
2 Praetorian prefect of Illyricum.
3 Praetorian prefect of Italy.
4 Praetorian prefect of the divisions of Gaul.
5 Praetorian prefect of Africa.
6 Praetorian prefect; comparable to what present-day official?
7 Privileges of the praetorian prefect.

1 2 3 4 5 CHIEF of all magistrates were the praetorian prefects, four in number—of the Orient, of Illyricum, of Italy, and of the divisions of Gaul. Finally Justinian added a fifth, the Prefect of Africa; and to him a special title in the *Code*[d] is devoted.

[d] I. xxvii.

(Of the prefect of the praetorian guard Tacitus writes as follows: 'He (Sejanus) extended the previously moderate power of this office by bringing the scattered cohorts together into a single camp, so that they could receive orders simultaneously, and through their numbers, strength, and the sight of each other, they might themselves gain self-confidence and become[2] a source of fear to others.' See that text[e] for further details.)

[e] *Annals*, IV [ii].

6 It is held by some that the praetorian prefects served the Emperors in the same capacity as a *magister equitum* served a Dictator. Others (e.g. Budé) compare them with the officer to-day called the grand chancellor. Still others liken them to the grand constable—an office found only in Spain and France. My own view is that they can hardly be compared to any of the officials of our times; for while they resemble them in some particulars, in many points they are very unlike.

Mention also is made in the *Authenticum*[f] of four prefects (namely, of the Orient, of Illyricum, of Spain, and of Africa), whose privilege it is to travel in coaches, to be announced by the voice of criers, [**15′**] and to occupy the judicial bench. (For, to digress, the right which the

[f] LXII, cap. i, col. 5 (*Novels*, lxx. 1).

[1] [For *absenti* read *abstenti*.—TR.]
[2] [The reading *crederetur* has been further emended to *oreretur*.—TR.]

more affluent even of the populace and artisans to-day assume throughout Italy, and especially at Milan, to ride at will through the city in carriages, in those saner times was allowed only to very prominent and important personages.)

It was among the other prerogatives of a praetorian prefect that 7
there was no appeal from his verdict, the Emperor assuming that the prefect will judge in the same way he himself would have done. It was a second prerogative that minors, if wronged by a decision of his, could be righted by no other than the prefect himself, unless perchance by the Emperor.[a] This rests on the obvious principle that a lower official may not pass judgement upon the action of a higher[1] magistrate.

[a] *Dig.* I. xi, sole law.

He may also enact laws, if they are not party legislation, but general in scope, and not in conflict with earlier regulations.[b] He has power also to unseat a judge for cause.[c] And he passes upon the injustice and unfairness of such a judge, even though the sufferer is a soldier; and the military chief will not take up the subject.[d]

[b] *Code,* I. xxvi. 2.
[c] *Ibid.,* 3.
[d] *Ibid.,* 4.

## CHAPTER XIII

### ON THE CITY PREFECT

### SYNOPSIS

1 City prefect; when the office was first inaugurated.
2 Powers of the city prefect.
3 Prefect of the treasury.
4 Prefect of the watch.
5 Prefect of artisans.
6 Prefect of the camp.
7 *Praefectus laborum.*
8 Prefect of public works.
9 'Prefect' a general designation.

THE city prefect follows the pretorian prefect both in rank, and 1
also in the order of titles in *Digest* and *Code*.[e] Of this officer Tacitus writes as follows:[f] 'In early times when the kings left home, and later when the magistrates left the city, they chose an officer to administer justice and to meet sudden calls, not wishing the city to be without a supreme executive. And tradition has it that Denter[2] Romulus was thus appointed by Romulus; so later Numa Marcius by Tullus Hostilius, and Spurius Lucretius by Tarquinius Superbus. Thereafter, the consuls made the appointment; and a survival is still seen as often as, on the occasion of the Latin festival, an officer is appointed[3] to act for the consuls.[4] Moreover, during the civil wars, Augustus put Cilnius[5]

[e] See *Dig.* I. xi and xii; *Code,* I. xxvii and xxviii.
[f] [*Annals,* VI. xi. 1 ff.]

[1] [For *magioris* read *maioris.*—TR.]
[2] [For *Dentē* read *Dentrem.*—ED.]
[3] [For *proficiscitur* read *praeficitur.*—TR.]
[4] [This being an occasion that called for the absence of both consuls from Rome at one time.—TR.]
[5] [For *Cillinium* read *Cilnium.*—ED.]

Maecenas,[1] a man [16] of equestrian rank, in charge of everything at Rome and in Italy. Later, when his power was now established, because of the size of the population and the tardy redress of the courts he chose men from among the ex-consuls to discipline the slaves and those elements in the civil body which are bold and unruly unless in fear of drastic action.'

In the supervision of supplies, the city prefect was associated with the food administrator, but with the understanding that the latter recognized the former as ranking higher.[a]

[a] See *Code*, I. xxviii. 1.

2 The city prefect had jurisdiction in the case of all crimes committed inside the hundredth milestone[2] (as to-day in the district of Milan the 'chief justice', as he is called, shares jurisdiction with any praetor and local judge of any state, the only question being who was first to take up the case).[b]

[b] *Dig.* I. xii. 1, at the beginning.

He heard also complaints of freedmen against their masters, and, in turn, of masters against freedmen. So too complaints regarding the cruelty or immorality of masters in their treatment of slaves, and regarding graver derelictions of guardians and the dishonesty of money-brokers.

He also fixed the price of meat. And it was his business to maintain order, particularly when games and public spectacles were in progress. Consequently he would station detachments of soldiers at strategic points. And for sufficient reason he could debar from trade or profession.

All these functions were his within the limits prescribed to him, but he took no action beyond them; however, he could delegate these functions to men within[3] the bounds.[c] But in the city[4] he ranked above all the magistrates, and he had jurisdiction over all corporate bodies and associations.[d]

[c] *Ibid.*, 3.

[d] See *Code*, I. xxviii. 3 and 4.

3 Finally, the Emperors established the office of prefect of the
4 treasury, mentioned in *Digest*, XLIX. xiv. 42, at the beginning; so prefects of the watch, referred to in the rubric and sole law of *Code*, I. xliii. And Justinian expresses surprise[e] that these latter were called 'night prefects'[5] by the Greeks.

[e] *Novels*, xiii, *praef.*

5 There were also prefects of artisans, prefects of the camp, *praefecti*
6 *laborum*, and prefects of public works, and[6] others of similar character;
8 for this is a class name, like *praepositus* and other titles of that kind.
9

[1] [*Mecaenatem*, i.e. *Maecenatem*.—Ed.]
[2] [i.e. from Rome.—Tr.]
[3] [The reference to the *Digest* suggests that *extra* ('outside of') should be read for *intra* ('within').—Tr.]
[4] [For *Infra* read *Intra*.—Tr.]
[5] [For *perfectos* read *praefectos*.—Tr.]
[6] [For *at a ique* read *atque*.—Ed.]

[16]

## CHAPTER XIV

### ON THE OFFICE OF MASTER OF TROOPS

### SYNOPSIS

1 The court master of troops.
2 The praetorian prefect, city prefect, and the master of horse and foot, are equal in rank.
3 Which takes precedence over other peers? the one that earliest entered upon office, or the one who first received his commission?
4 The provost of the imperial household equals in rank the praetorian prefect.

NEXT after the prefects come the court masters of troops, of whom there were many, both of horse and of foot. Some were stationed in Illyricum and Thrace, others throughout the Orient, some also in the West. On these and other Roman officials there are remarks by the writer mentioned above, in his *Report to Theodosius*, found also in the works of Alciati.[a] 1

The rank of all prefects (both praetorian and of the city) and of the master of foot and horse was practically on a par and equal; but with this reservation, that when it was their time to return to private life, precedence was given to the man who was found to have first secured promotion and received his commission.[b] And precedence in the matter of sitting, speaking, and voting is accorded the man who has longest enjoyed the lustre of office held; and this is to be observed in the case of all persons who are peers in position and rank.[c] 2 3

Moreover (to touch this point in passing), the provost of the imperial household, whom to-day they call the grand chamberlain, is equal in rank to the above-mentioned masters, and even to the prefects, with the reservation that, on laying down office, precedence is given that man among them who was first appointed, and second place falls to one who was later in securing recognition.[d] 4

[a] Following tract. *De Magistratibus Civilibusque et Militaribus Officiis.*

[b] According to *Code*, XII. iv. 1.

[c] See *Code*, XII. iv. 2.

[d] See *Code*, XII. v. 1.

## CHAPTER XV

### ON THE DUTIES OF THE CHIEF OF THE SECRETARIAT AND OTHER OFFICERS

### SYNOPSIS

1 Chief of the secretariat.
2 Chief of memoranda.
3 Chiefs of correspondence.
4 Chief of Greek correspondence.
5 Chief of documents.
6 The Master of Offices.
7 Duties of the court marshals.

1 Following the above-mentioned officials, the chiefs of the secretariat enjoyed great authority. To them the rubric and sole law of *Code*, XII. ix, are devoted.

2 Under their direction were: The chief of memoranda, [17] who 3 phrased and issued all decisions, and answered petitions; the chief of correspondence, who had to do with legations, interviews, and petitions 4 of states; a second chief, of Greek correspondence, who either indited Greek communications or translated such into Latin; and the chief of 5 documents, who had oversight of law cases and the pleas thereto pertaining. (Mention is made of these chiefs in *Code*, X. xlviii. 11, where their privileges are enumerated; so in XII. xix. 3. The number serving in any bureau is indicated in *Code*, XII. xix. 14.)

6 High also was the power and standing of the Master of Offices[1], 7 whom the Emperor refers to as 'his excellency'.[a] Among other things it was his business to advise the Emperor as to the enrolment of soldiers. His, too, was the oversight of camps and fortifications.[b] Under his supervision also were the entire first and second classes of shield-bearers. So too the senior foreign troops, all archers, heavy infantry, cuirassiers, junior detachments, junior foreign troops, *agentes in rebus*, and assistants in that same department. Again, measurers, torch-bearers, the bureau of memoranda, the bureau of correspondence, the bureau of petitions, the bureau of enactments, the reception staff—all these were under the Master of Offices.[c]

[a] *Code*, I. xxxi. 5.

[b] See *Code*, I. xxxi. 4.

[c] See the above cited treatise following Alciati, *De Magistratibus Civilibusque et Militaribus Officiis*, i.e. in the above cited '*Report to Theodosius*'.

[1] [For *erant magistri* read *erat magister*.—Tr.]

## CHAPTER XVI

### ON VARIOUS COUNTS

### SYNOPSIS

1 '*Comitatus*' defined.
2. Standing of the counts.
3 Count of the fiscus.
4 Counts of trade.
5 Counts of mines.
6 Counts and finance officers.
7 Prefects of the treasury.
8 Warders of linen vestments.
9 Warders of personal wearing apparel.
10 Directors of the imperial textile works.
11 Directors of woollen mills.
12 Directors of dye-works.[1]
13 Directors of the mints.
14 Chief of transportation.
[17'] 15 Count of vestments.
16 Count of the gold.
17 Count of treasury business.
18 Privy count of the imperial household.
19 Private transportation service.
20 Overseers of herds.
21 Overseers of stables.
22 Commissioners of pastures.
23 Private accountants.
24 Chief secretary of indulgences.
25 Chief secretary of rules.
26 Chief secretary of releases.
27 Chief secretary of the privy purse.
28 Count of the fiscus.
29 Count of the palace.
30 Count of the imperial stable.
31 Counts of provinces.
32 Counts of the privy council.
33 Counts of country estates are unworthy of the name.
34 Counts of the palace guards.
35 Counts of residences.
36 Counts of the departments.
37 Counts of highest rank.
38 Physicians-in-chief.
39 Is a military count higher than a vicegerent?
40 Should a person who has held the same office several times[2] take precedence over one who has held it but once?
41 Should the man have precedence who is prior in honorary office, or one who follows in this particular, but who is prior in actual administration?
42 He who has paid the fee for honorary office does not pay again for actual tenure.
43 Office held should have an aftermath of distinction.
44 A junior who is far higher in rank takes precedence over an older man.
45 Whether precedence should be given to a person who retires by favour or to one who retires in due course.
46 Counts of the imperial horse and foot guards.

THE place where the Emperor passes his life is called *comitatus*, as 1
Alciati in several passages points out. Hence those who live and stay
continuously in the palace are called *comitatenses*; [18] hence also the
term 'counts'.[3]

The power and dignity of this position were great. And highest 2
of all were the counts of the fiscus, who were stationed in almost 3
every province. For everywhere the counts of trade were under their 4
direction; so also the count of mines, and the count and finance officer 5 6
of Egypt.

[1] [For *baffrorum* read *bafiorum* (i.e. *baphiorum*).—TR.]
[2] [For *plnries* read *pluries*.—ED.]
[3] [Literally, 'companions', 'attendants'.—TR.]

Under this official too were the prefects of the treasury, the warders of linen vestments, the warders of personal wearing apparel, the directors of the imperial textile works, of the woollen mills, of dye-works,[1] and of the mint, and the chief[2] of transportation.

Under him also were another fiscal count for Illyricum, the count of vestments, the count of gold, the count of Italian finance, the count of treasury business in Africa, and the finance officers posted everywhere in the provinces.

The Emperor had also a count in charge of the private business of the palace.[a] And under his direction was the private transportation service, and the overseers[3] of herds, of stables, and the commissioners of pastures, and also the private accountants.

[a] See *Code*, I. xxxiii, rubric, and entire title generally.

He had also on duty a chief at large, a chief secretary of indulgences, a chief secretary of rules, a chief secretary of releases, a chief secretary of the department of the privy purse, and all the other secretaries of these bureaux. He had, too, a second officer at large, who handled the documents of the entire office, as you may see more at length by reference to the above mentioned '*Report to Theodosius*'.

In the *Code* there are special titles and many laws dealing with the office of the count of the fiscus, of the count of the palace,[4] of the count of personal assets, and of the count of the Orient. Therein, however, various trifling regulations are set down, which bear little upon the study of law or upon military science.

Mention is made also of the count of the imperial stable, and of the counts of Egypt and of the Pontic district;[b] so of the counts of the privy council,[c] who are called 'very highly distinguished' in *Code*, XII. x. 1, and rated with proconsuls. They attended the Emperor's privy council and his tribunal. Such to-day is the rank of 'counsellors', as they are called.

[b] *Code*, XII. xi, sole law.
[c] *Ibid.*, x.

(Speaking of the above, Lucas de Penna says[d] that 'count' is a title of dignity, and that it always presupposes distinguished merit on the part of the bearer; if this is lacking, the holder of the title must not only be excluded from attendance upon the Emperor, but he may not even reside near the palace.[e] In these days, however, he declares that, on account of their great numbers, the multitude of counts makes for cheapness, especially those who owe their titles to country estates and castles.)

[d] *On Code*, rubric, XII. x.
[e] *Code*, VIII. xi. 17.

These counts of the privy council are, I say, called 'very highly distinguished' by the Emperor.[f] There were also counts of departments, counts of the palace, and military counts who ruled provinces. And to these are devoted individual titles in the *Code*.[g]

[f] *Code*, XII. x, 1 and 2.
[g] *Ibid.*, xi ff.

There were also counts of the palace guards,[h] [18′] counts of residences,[i] counts of departments;[j] so also counts of the first rank, to

[h] *Ibid.*, xvi. 1.
[i] *Ibid.*, xxiii. 3.
[j] See *Code*, XII. xi. 1.

[1] [For *baffiorum* read *bafiorum* (i.e. *baphiorum*).—Tr.]
[2] [For *propositus* read *praepositus*.—Tr.]
[3] [For *Propositi* read *Praepositi*.—Ed.]
[4] [But in place of *palatii* the accepted reading in the rubric in question is now *patrimonii*.—Tr.]

whom soldiers too were assigned, to be conducted to remote provinces, or there to be commanded. These take precedence over men who have the proconsular insignia, and they are rated with governors who have administered provinces, excepting Egypt and the Pontic district.[a] We 38
read also[b] that physicians-in-chief, who have served among counts of the highest rank, are rated with military commanders and vicegerents.

These all are 'very highly distinguished', excepting those whom I have mentioned above as 'illustrious', and of whom the Emperor speaks in *Code*, XII. xxxvii. 8; and that all were not on a par in dignity was noted by Accursius.[c] Of the physicians-in-chief I have spoken in the preceding section; and the Emperor grants precedence to military 39
counts over the vicegerents of the praetorian prefect,[d] but only in military matters; for in civil relations the vicegerent is given preference, as is stated in *Code*, I. xxxviii. 1,—a law which sheds some light on the question whether a knight or a doctor takes precedence.

And now that the discussion has turned to rank and precedence, 40
I ask: Which has precedence,—a person who has held an office earlier, but only for a single term, or one who has held it several times—after both have retired to private life? And *Code*, XII. iii. 1, rules that office frequently held shows proved worth, but does not augment it. We conclude, therefore, that he who is first in time is first also in privilege.

I raise the further question whether a person who first secures an 41
honorary office, but is later in its actual administration, takes precedence over one who was later in securing appointment but earlier in administration. And *Code*, XII. iii. 4, rules that the one earlier in honorary office takes precedence ('in regard to all the honours and privileges of consuls, he should know that precedence is to be claimed on the basis of earlier promotion').

And the above law should be noted also for another point, namely 42
that in case a person, who has secured an honorary office and paid the usual fee therefor, at another time secures the same office with power of administration, he will not pay the same amount a second time.

From the laws cited above we learn, further, that those who at some time have been distinguished by high office, are accorded honour also after their retirement, as an aftermath of office-holding. Further 43
evidence is found in *Code*, XII. ix. 1, with additional discussion in a gloss.[e] To this same effect might be cited *Code*, XII. v. 5, as Baldus interprets it, and as a gloss there implies. (But perhaps the meaning of this law is different, namely that the provosts of the household —even of the Empress—after the completion of their service are entitled to the use of the coach and belt, not as an aftermath of office-holding, but in case they have risen to senatorial [19] dignity: unless one were to assume that by virtue of serving the required time they are advanced to senatorial standing, which is implied in *Code*, XII.

[a] *Code*, XII. xii. 1 and 2.
[b] *Ibid.*, xiii. 13, sole law.
[c] *On Code*, rubric, XII. xiv.
[d] *Code*, I. xxxviii. 1.
[e] *On Code* XII. iv. 2, gloss 2.

xvi. 3.) The rules for precedence in the case of those who have held honorary office, and for those who have seen actual and real service, and for those who have been exempted earlier or later, are found stated in *Code*, XII. viii. 2.

In regard to this subject of precedence I think that we should note another point, namely, that the principle that priority in time means
44 precedence in rank is subject to the proviso: unless a younger man far out-classes an older, and the fact is attested by fifteen witnesses of the same rank and calling. For both qualifications see *Code*, XII. xix. 7. (This seems in conflict with what I have said above under number 41; and we might reconcile by assuming that one case has to do with an honorary office, which carries with it an aftermath, the other with an honorary exemption, which carries no aftermath of office-holding.[a])

Moreover, those who have served for a time, and then have been released through honorary exemption, are not given precedence over those who have served through a full term, even though the latter were later in taking office.

45 And those who have served their term and earned actual retirement take precedence over those who at the time are in the administration of the same office;[b] for what one is attempting to accomplish, the other has already carried through.

46 There were also at court two counts of the imperial horse and foot, who had charge of these palace guards.

[a] *Code*, XII. xxi. 4, § 2, supported by *Code*, XII. vii. 2.

[b] *Code*, XII. xxviii. 4.

[19]

## CHAPTER XVII

### ON THE OFFICE OF VICEGERENT

### SYNOPSIS

1 'Vicegerent' a general term.
2 A vicegerent is a sort of shadow of another.
3 A vicegerent appointed by the Emperor is different from one appointed by a magistrate;
4 And they do not enjoy equal rights.
5 A vicegerent may be recalled, even though appointed to a permanency.
6 Permanent vicegerents of provinces are like the praetorian prefect.
7 The powers of a permanent vicegerent depend upon the commission issued to him.
8 Imperial vicegerents; who they are.
9 Whether the Emperor may subordinate one imperial vicegerent to another;
10 And whether he may recall him.
11 No one may be vicegerent to a person against the will of the latter.
12 The Emperor may appoint a censor and supervisor for a vicegerent;
13 Particularly so, when the vicegerent heavily oppresses the subjects.
14 In the territory of a duke, marquis, or count, the Emperor is duke, count, or marquis.

1 The power and authority of vicegerents were very similar to those of counts. The term 'vicegerent', however, is of wide application.

[a] *Dig.* XXI. i. 17, § 7.
[b] *Code*, I. l.

For even a slave may have a 'vicegerent';[a] and, further, this is a general name for all magistrates.[b]

But in *Code*, I. xxxviii, a man holding the place of a praetorian prefect is perhaps called 'vicegerent' by antonomasia. This is indicated by the first law of that title, though gloss 1 there understands otherwise, stating that the reference is to the vicegerent of a military count—an interpretation quite inconsistent with the law cited, which directs that precedence be given to one of two men in certain situations, and to the other elsewhere; this should not be said of a count and his vicegerent, inasmuch as a person who represents another is in a way his 2
[c] *Dig.* I. xxi. 3. shadow, and, therefore, his inferior.[c]

Perhaps, too, the vicegerent to a praetorian prefect was appointed by the Emperor himself; for, in *Digest*, I. xxi. 2, such a one transmits reports in his own name to the Emperor, whereas otherwise it would be the proper procedure to report to the prefect himself, or to the Emperor in the prefect's name.

In fact, that the Emperor himself (as well as the magistrate in 3 office) appointed vicegerents is shown by *Code*, I. l. 2 ('who by the Emperor's order or that of your august court'). Hence the Cardinal
[d] *On Constitutions of Clement*, I. vii, oppo. 6.
[e] Qu. 3. stated[d] that though a vicegerent normally does not enjoy rights equal 4 to those of the person he represents, this rule applies only when he is appointed by that person, and not if the appointment is made by higher authority. And he there adds[e] that there are four classes of vicegerents.

[f] *On Dig.* I. xvi. 6, § 1.
[g] *On Constitutions of Clement*, I. vii, qu. 13.
[h] Consilia, II. 20 (*Visis et ponderatis omnibus supra narratis*).
[i] *On Constitutions of Clement*, I. vii, qu. 16.

That a vicegerent may be recalled was stated by Baldus;[f] and the 5 Cardinal held[g] that this is true even of a vicegerent appointed to a permanency.

Paolo di Castro[h] finds a likeness between the praetorian prefect and 6 the permanent vicegerents appointed to the provinces by the Pope. Consequently, according to him, they may not enact legislation amending the common law. The Cardinal also adds[i] that their powers depend 7 upon the commission issued to them.

There is too, I think, this difference between a vicegerent appointed by the Emperor and one appointed by a magistrate, namely, that the latter may not delegate his powers to another, whereas the
[j] *Dig.* I. xxi. 5; and II. i. 5 and 6, with gloss there, words *alieno beneficio*.
[k] *Rei Militaris Instituta*, II. ix. former may do so.[j]

Again, the prefect of a legion was its special judge; and in the absence of the commander he exercised supreme authority, as vicegerent of the latter. (For this officer and for the commander himself see Vegetius.[k] The canonists have much to say of the commander; [**20**] but their remarks look in another direction, and have little bearing on our subject.)

And whereas prefects, counts, and other high officials everywhere had assumed the right to substitute vicegerents for themselves, Justinian

forbade the practice, excepting in the provinces of Osdroena[1] and Mesopotamia, denying the privilege to all other officials.[a] (On the manifold variety[2] of vicegerents see the broad indulgences of Felinus.[b])

8 Even in these days permanent vicegerents are appointed by the
9 Emperor in many provinces. About them Baldus[c] discourses at length; and he also raises the question whether the Emperor may subordinate
10 a permanent vicegerent to another vicegerent of his, or even recall him.

On both points he answers in the affirmative, inasmuch as a
11 vicegerent is a minister and nothing more, and no one has a vicegerent against his will. (For it would be contrary to nature that a person should render duty and service to one who did not desire it; and 'since the audience chamber is the same, no one shall sit in my audience chamber against my will'.) For, says he, just as the Pope may depose a cardinal, so may the Emperor depose a baron of his; much more, therefore, may he subordinate one to another.

12 He also, says Baldus, may appoint a censor or supervisor for a
13 baron or permanent vicegerent of his; for he should not allow his vicegerent to ruin[3] the district committed to him, let us say by subjecting it to new and insupportable exactions. Otherwise, he may recall him. And he might even issue orders that the vicegerent must not impose burdens or declare war without the approval of the supervisor.
14 Baldus subjoins, further, that the Emperor is duke, marquis, and count, which is to say, that in the lands of a duke or marquis he has the same powers as a duke or a marquis. Thus Baldus.

[a] *Novels*, cxxxiv. 1 and 2.
[b] *On Decretals*, I. iii. 27, col. 2.
[c] *Consilia*, I. 328, beginning: *Quaeritur si rex Romanorum.*

## CHAPTER XVIII

### ON DUKES

### SYNOPSIS

1 Dukes are 'very highly distinguished'.
2 Dukes are numerous.
3 'Duke' originally a designation of office, now of honour.

The power and dignity of dukes was not unlike that of counts or vicegerents; for dukes, too, were 'very highly distinguished'.[d]

1 Very many dukes are mentioned in *Novels*[e] and in *Code*, I. xxvii.
2 2. And, in addition to those named in that law, you will find several dukes [**20**′] referred to in the oft-cited treatise [*A Report to Theodosius*] in the works of Alciati.[f] Moreover, that some dukes were 'illustrious' is shown by *Code*, VII. lxii. 38.

[d] *Code*, XII. xi. 1; XII. lix. 8.
[e] cxxxiv. 1.
[f] Following tract. *De Magistratibus*, etc.

[1] [Now generally written Osrhoëne.—Ed.]
[2] [For *species* read *specie*.—Tr.]
[3] [For *discipare* another reading is *dissipare*. Better still would be *discerpere*.—Tr.]

Under the name of duke and provincial governor the Emperors often sent men to rule provinces, and these served too as army heads. So *Code*, I. xl; and, as I have said, there is mention of many dukes of various provinces in the above-mentioned treatise in the works of Alciati.[a]

[a] [*A Report to Theodosius*, following tract. *De Magistratibus*, etc.]

However, dukes and the majority of counts were merely 'very highly distinguished', and not 'illustrious'.[b] Understand this, however, in the light of what has been said above.

[b] *Novels*, xxiii. 4.

In those earlier times without doubt these names were designations 3
of office; to-day they have become titles of honour; see *Feuds*,[c] where division of fiefs is forbidden, and other regulations are laid down which it would be too tedious and too remote from our subject to rehearse here.

[c] I. xiv; II. x; II. lv. § 4. 10th col.

## CHAPTER XIX

### ON THE OFFICE AND POWERS OF CONSUL AND PROCONSUL

### SYNOPSIS

1 Consuls; when first appointed.
2 The consular army; its size.
3 What the powers of a proconsul were.
4 Outside his province a proconsul has no jurisdiction, excepting in matters involving no dispute.
5 A proconsul is liable for the acts of a wife taken with him into his province.
6 A proconsul may not delegate cases strictly executive.
7 However, he may delegate one matter.
8 A proconsul will accept gifts in great moderation.
9 In his province a proconsul outranks every one.
10 A proconsul should see to it that no one in his province becomes a menace to others because of excessive power.
11 A proconsul does not leave his province before the arrival of a successor.
12 A proconsul will remain fifty days in his province to render an accounting.

It is said[d] that the consular office and power arose on the expulsion 1
of their kings by the Romans; and this is attested by all the historical records, especially those of Livy.

[d] *Dig.* I. ii. 2, § 16.

The powers of this official were as great in war as in peace, and at home as abroad. [21] Cicero everywhere testifies to the things brought to pass by himself within the city[1] during the time of his consulship, always insisting that Rome was born anew in that year—and being called for this reason 'Father of his Country'. In nearly every other case consuls gained fame abroad and in war, rather than at home and in peace.

It is certain that, for service against the enemy, a single consul was 2

[1] [At the time of Catiline's conspiracy it was arranged that Cicero should remain in charge at Rome, while the other consul (Antonius) took the field with an army.—Tr.]

fully equipped with two legions and as many auxiliary troops, or a little less, making in all twenty thousand foot and four thousand horse. But if the force of the enemy was so great that the state needed both consuls in the field, these figures were doubled.[a]

3 As for the proconsuls, at the time when the state was in its prime,[1] and before so many offices were devised and established by the Emperors, they, next after the consuls, enjoyed great distinction, having committed to them armies, commands, and provinces. And in no respect did they differ from consuls, excepting that either they had already held that office and position and their powers were prolonged, or at any rate they were sent out with consular authority. Moreover, even under the Emperors their standing and power was not to be despised. (On this office you will find much information in many laws of *Digest*, I. xvi, and in *Code*, I. xxxv. 1. It carried proconsular insignia, which you will find graphically described in the *Report to Theodosius* already cited several times above. Compare, too, *Digest*, I. xvi. 1.)

4 A proconsul does not exercise his powers until he has entered his province;[b] but outside its limits he may act in cases that involve no dispute.[c]

5 Furthermore, he will do well not to take his wife into his province; for if he does so, he is liable for her acts.[d] And he will not delegate jurisdiction to a lieutenant before his arrival in the province (for he cannot delegate this to another sooner than he is able to acquire it himself[e])—unless he suffers unavoidable delay on his journey.[f]

6 At any rate he will not delegate really executive functions;[g]
7 though he may delegate one matter, i.e. the examination of a prisoner.[h]
8 Above all else, a proconsul must be circumspect in regard to the receipt of presents. For to accept from no one would be extremely discourteous;[2] to accept indiscriminately would be very discreditable; and to accept everything would be avaricious beyond measure.[i]

It is a part of his duties also to supervise public works; and to see to it that they are cared for and repaired or completed;[3] and to put in charge superintendents of works, supplying soldiers as labourers when necessary.[j]

9 Further, in his own province he outranks every other officer.[k] Hence he will handle all cases pertaining to his province. But he will do well to refer to the Emperor's procurator cases involving financial claims of the fiscus.[l]

[21′] He should also show himself circumspect in giving ear to pleaders at law. He should not be strict beyond measure; nor should he allow them to manufacture cases, to buy them up, or to assume a sham role.[m]

[a] See Vegetius *Rei Militaris Instituta*, II. iv, and again III. i.

[b] *Dig.* I. xvi. 1.
[c] See *Ibid.*, 2.

[d] *Ibid.*, 4, § 2.

[e] *Ibid.*, § 6.
[f] *Dig.*, I. xvi. 5.
[g] *Ibid.*, 6 and 11.
[h] Law 6 just cited, at the beginning.

[i] *Ibid.*, § 3.

[j] *Dig.* I. xvi. 6 [I. xvi. 7].
[k] *Dig.* I. xvi. 6 [I. xvi. 7, § 2.]; I. xvi. 8.

[l] *Ibid.*, 9, at the beginning.

[m] *Ibid.*, § 2.

[1] [For *Florentae* read *florente*.—Tr.]
[2] [For *in humanum* read *inhumanum*.—Ed.]
[3] [For *consumentur* read *consummentur*.—Tr.]

And in particular he should see to it that, while[1] the cases of the more influential are tried, there shall be no neglect of the causes of others, especially of people in misfortune, for whom, in case of need, he will even provide a pleader. And he will take care that no one in the 10
province becomes a menace and a terror to others because of undue
[a] *Dig.*, I. xvi. 9, at end. power.[a2] (Moreover, cases involving parents and children, or masters or
[b] *Dig.*, I. xvi. 9, § 3. patrons and freedmen, he will settle out of court.[b])

A proconsul shall not retire from his province nor cease to hold 1
court until the arrival of his successor, even though otherwise the
[c] *Ibid.*, 10. period of his tenure is complete. And he will not allow his lieutenant
[d] *Ibid.*, 14. to retire, except with himself, after the duties of office are finished.[c]
(Among his insignia a proconsul had but six fasces.[d])

Further, he should tarry in his province fifty days in order to 12
[e] *Authent.*[4] VIII. ix, § 1, at the middle [*Novels*, viii. 8, § 1]. render[3] an account of his term of service, giving public audiences and
[f] See *Novels*, xxx. 5 and 10. answering complaints.[e]

The proconsul was a person 'very highly distinguished'.[f]

## CHAPTER XX

### ON THE OFFICE OF PRAETOR

### SYNOPSIS

1 Praetor; whence the name.
2 Formula used in installing a praetor.
3 A praetor's office lasts one year.
4 A praetor should hold court in places sanctioned by usage.
5 Barbarius was really a praetor.
6 Jason in need of correction.
7 An error often repeated constitutes law; and how this is to be understood.
8 A praetor is 'very highly distinguished'.

That 'praetor' is derived from *praeeo* or *praesum* was stated by
[g] *On Dig.* I. xiv. 2, no. 52. Zasius.[g] According to my idea, this suits better a president (*praeses*). 1
But the other view is supported by the reading in *Novels*, xxiv, where the caption is: 'On the Praetor[5] of Pisidia'—a designation applied, says the Emperor, because those officers go before (*praeeo*) and are set over (*praepono*) all others.

[h] *Loci Communes Juris Civilis*, car. iv, no. 7. Oldendorp[h] quotes the formula for installing a praetor from the 2
[i] *Rei Militaris Instituta*, III i, above cited. words of a law of the Twelve Tables.

[22] The constitution of a praetor's army you will find in Vegetius.[i] It comprised ten thousand foot-soldiers and two thousand horse.

At one time the question was raised at Rome whether, in the absence of the consuls, a praetor could hold a consular election; and it was decided that he could not, on the ground that it was unseemly and contrary to ancient precedent that a lower magistrate should impart

[1] [For *nedum* read *ne, dum*.—Tr.]
[2] [No one being willing to undertake cases against them.—Tr.]
[3] [For *redituram* read *reddituram*.—Tr.]
[4] [For *auc.* read *auth.*—Tr.]
[5] [For *Praeside* read *Praetore*.—Tr.]

authority by the appointment of a higher. So Zasius reports Cicero, in the reference above given.

3 As the praetor's power was limited to one year, so the actions founded on his edicts were for the most part annual. As to which were annual, and which continuing, see Rogerius,[a] an old-time Doctor.

That the Romans had praetorian provinces, as well as consular and proconsular, is indicated by all good authorities.

4 When administering justice, a praetor should sit in a place sanctioned by precedent; otherwise his action is void.[b]

That a man may appeal to a praetor if he feels himself wronged by another praetor is shown, so far as I can recall, by a single passage, found in Caesar.[c] Marcus Caelius Rufus, he says, undertaking to champion the cause of the debtor class, set up his tribunal near the seat of Trebonius, the city praetor; and if any one should appeal in regard to assessment and payment, he promised his assistance.

There you will see also that a praetor had the power to enact new laws; and this is abundantly confirmed by the edicts interspersed in so many passages in the *Digest*.

5 It is ruled in *Digest*, I. xiv. 3, that a slave can be praetor, if chosen by the people in ignorance of his status. And it is strange that the general opinion of the Doctors on this passage is that the man in question was not really a praetor; for the words of the law preclude that view ('slavery was no bar', says Pomponius,[1] 'to prevent his being praetor'. So again: 'And yet it is true that he held the praetorship'[2]—words which signify fact, and not a fiction.)

But it should not be assumed that this slave Barbarius became thus a free man. For there was no ground for depriving the owner of his right (since he ought not to suffer for the dereliction of his slave); and the owner still retained possession, even though the slave had run away;[d] and the people in electing him had not intended manumission—though that would have been within its power had it so willed. (On this subject there is a ruling in *Code*, VII. xvi. 11, and XII. xxxiii. 6 and 7; and though this law was a later enactment, it still shows what was the proper decision.)

6 It is surprising, also, that Jason doubted the statement of Baldus,[e] who held that Barbarius would have enjoyed a valid tenure of the praetorship, even if he had been chosen by the Emperor alone. Against this view Jason[f] argues to little purpose; for in a certain law,[g] near the close, Pomponius makes the express statement: 'This right is to be recognized all the more in the case of the Emperor.'

7 To the validity of such praetorship [22′] many circumstances

[a] *De Diversis Praescriptionibus*, at the beginning.

[b] *Code*, VII. xliii. 5; VII. xlv. 6, with gloss; comment by Baldus *On Dig.* I. i. 11; [*Dig.* I. i. 11, *fin.*].

[c] *Civil War*, III. [xx].

[d] *Dig.* XLI. ii. 3, § 10; XLIII. iii. 15, § 1.

[e] *On Code*, III. xxxiv. 2.

[f] *Ibid.*,[3] Col. 13. extens. 4.

[g] [i.e., *Dig.* I. xiv. 3.]

[1] [For *Pomponins* read *Pomponius*.—Ed.]
[2] [The reading of the *Digest* is: *Atquin verum est praetura eum functum*.—Tr.]
[3] [So in the Latin text. The reference is probably to Jason's work on the *Code*.—Ed.]

contribute—the power vested in the electors, the confidence of those who assumed the legality of the election and the candidacy, and consideration for the public welfare. For although it might appear a matter of individual concern, still in the course of the year probably so many people appeared before the praetor, and he might also have made such enactments that it would be to the state's interest generally that they be not rescinded. Accordingly, it would be a mistake to apply this law to other questions where concomitants of this sort are lacking. But on this point Jason here waxes eloquent.

That the praetor was one of the higher magistrates is shown by a passage in Aulus Gellius;[a] for he says that consuls, censors, and praetors comprise that class. In the *Authenticum*[b] the praetor is referred to as 'very highly distinguished'. This is true also of the proconsul, the prefect 8 of the watch, and the imperial prefect and prefect of Egypt; so also of vicegerents, dukes, and counts, in nearly every case [according to Durandus].[c]

As to the duties and powers of the praetor, any one may inform himself by consulting *Digest*, I. xiv, and *Code*, I. xxxix.[d]

At Rome there were three praetors, with power for a year only, and selected by action of the senate. These must be bona fide residents of the city; and provincials may not be chosen. For all this see *Code*, I. xxxix. 2.

Every one knows that all [1]the edicts quoted throughout[2] the *Digest* and expounded by Ulpian were the work of praetors in the period when the state was still in its prime.

[a] XIII. xv. 4.

[b] C, § simili. [= *Novels*, xciii.]

[c] *Speculum*, tit. *De Iurisdictione Omnium Iudicum*, § 1, word *medii*.

[d] And again, *Code*, XII. ii.

## CHAPTER XXI

### ON THE OFFICE OF GOVERNOR

### SYNOPSIS

1 The governor and his office.
2 Who are obliged to repair or to sell buildings.
3 A madman should be put under restraint by his relatives.
4 Neglect should not go unpunished when it results in damage to another.
5 A governor should not leave his province.
6 A governor will act as judge for his own household.
7 Whether a vassal may act as judge with reference to an injury to himself.
8 To what extent eatables are to be received.
9 A governor may not condemn to banishment.
10 Other things he is forbidden to do; see text.
11 With regard to punishment, very distinguished persons are not under the governor's jurisdiction.
12 Punishment of an expert professional is postponed,[3] and the Emperor is consulted in the meantime.

THE office of governor and the name, too, are general; for all 1 rulers of provinces can be designated by this term.[e]

[e] See *Dig.* I. xviii. 1.

[1] [Reading *omnia* for *omni*.—TR.]
[2] [For *larè* read *late*.—TR.]
[3] [*difertur*, i.e. *differtur*.—ED.]

Acting as judge, a governor [**23**] may emancipate and adopt his own son or manumit his own slave.[a] Normally he has authority only over the people of his own province; but if outsiders commit any crime therein, he will not overlook it, but will see to it that the province is cleared of evil doers.[b]

[a] *Ibid.*, 2.

[b] *Ibid.*, 3.

It is a part of his duties to prevent illegal and forced contributions and contracts, and to provide that no one experience undue gain or loss, that the more powerful do not injure the weaker, that no one be barred from lawful trade or allowed to attempt illegal methods, and that poorer people do not bear the brunt of military service and contribution, while the richer evade them—as often is the case in these times of ours. All this is to be found in *Digest*, I. xviii. 6.

2 The governor will also cause ruinous buildings to be repaired—but after investigating the situation.[c] As for my saying 'after investigating the situation', understand according to the explanation of the Doctors on *Code*, VIII. x. 8, whereby a municipal senator is obliged both to repair and to build anew, while others are under obligation merely to repair. (However, Baldus[d] conditions this upon the man's ability; for the impossible cannot be required. But perhaps in such a case a man will be forced to sell in order to save the city from being defaced by tumble-down structures.) In regard to this subject another wider distinction is made by Albericus.[e]

[c] *Dig.* I. xviii. 7.

[d] *On Code*, VIII. x. 8.

[e] *On Code*, VIII. x. 4.

It also belongs to the business of a governor, as I have said, to maintain order in his province. This he will accomplish easily if he diligently seeks out and punishes evil doers, not forgetting the people who shelter them; for, without the help of the latter, robbery and most other crimes cannot be kept hidden.[f]

[f] *Dig.* I. xviii. 13.

3 As for madmen who do injury to others, in case they are persons who cannot be kept under restraint by their relatives (perhaps because of poverty, as in cases coming under my own observation), the governor will confine them in prison. Regarding a person such as I have described, I once advised a vassal (whose dependant he was) to take this action himself, lest otherwise I should be under the necessity of laying hands upon a retainer of his, inasmuch as the latter was truculent and injurious to my people.

But since madness is sometimes feigned, in order that, under this cover, people may be secure from a charge of malicious mischief, the governor or the person whose concern it is will look into the facts of the case, and in accordance therewith will take precaution against future injuries; or he will take up and punish the offences already committed; see *Digest*, I. xviii. 13, at the end, with the following law, in which the further direction is given that, in the case of a madman whose attacks of insanity are periodic, inquiry is to be made as to the time when he did the injury, also who was in charge of him, and why

he was not watched. For neglect on the part of the warders should not 4
go unpunished, whether patients injure themselves or other people.[a]

A governor may not leave his province except to perform a vow, 5
and then he must not be away over night.[b]

Rulings are various as to the right of a governor to act as judge in 6
the cases involving his own establishment—including followers, attendants, and slaves. And as for crimes, [23′] especially such as cannot be defended or condoned, he will do right not to let them go unpunished, nor to delegate their punishment to his successor.[c]

Bartolus, however, distinguishes between crimes that have an official bearing and those that do not, citing *Digest*, XLVIII. xix. 6, § 1, and *Code*, III. ii. 3. Again, if injury is inflicted upon the above, he distinguishes between flagrant crimes and others which are not flagrant.

Furthermore, even in the case of a flagrant crime, the canonists once more distinguish according as a penalty is set by law, or it is left to the discretion of the person who judges. For in this latter case the penalty might be unduly severe; and for that reason it will rightly be objected to.[d]

And, in that connexion, they apply these principles to the case 7
where a vassal has been injured by a subordinate of his, raising the question whether he may proceed against the latter; and they cite Oldradus, who upholds[1] the negative.[e] This question is considered also by Brunus,[f] who concludes that in strict law such action is not valid, either on the part of the vassal, or even on the part of a judge appointed by him. In confirmation of this view he makes many citations; moreover, he is supported in regard to the specific case under his consideration both by the contrary practice and by the fact that the defendant had suffered judgement to be passed. And truly with great justice it is urged that no one should act as judge in his own case, or in that of members of his household.[g]

In laying down his office, a governor does not lose his right of command,[h] because, as I think, it was conferred not so much for his own benefit as for that of the provincials.

Again, a governor should be chary of accepting presents, as was 8
said above of proconsuls. But he may accept food and wine for the following day's use.[i] Perhaps it would not be out of place to add that even those eatables should not be presented with such regularity that day anticipates day, and they thus become a regular contribution —so circumventing the law.

As regards his conversation, a governor should observe a mean, being neither repellent and difficult to approach and address, nor yet so free and easy as to be cheapened and despised; neither excessively severe and harsh, nor on the other hand too sympathetic.[j]

[a] *Dig.* I. xviii. 14, at the end.

[b] *Dig.*, I. xviii. 15.

[c] *Dig.*, XLVIII. xix. 6 § 1.

[d] On *Decretals*, II. i. 12, with comment by Felinus, col. 2.

[e] *Consilium* 7.

[f] *Consilium* 30.

[g] *Dig.* II. i. 10.

[h] *Dig.* I. xviii. 20.

[i] *Ibid.*, 18.

[j] *Ibid.*, 19.

[1] [For *respōdēt* read *respondet*.—Ed.]

9 Governors are to understand that the punishment of banishment
10 is beyond their jurisdiction;[a] also that of imprisonment, either temporary or permanent.[b]

It is forbidden also for them to reverse their decisions.[c] And they
11 may not pass judgement on municipal senators or prominent men of their province, even though they be guilty of high crimes; and still less may they punish them, but they must report the cases to the
12 Emperor and await his verdict. Meanwhile, however, they will hold the men in confinement.[d] The same procedure will be followed in regard to a defendant who is particularly strong and skilful,[1] even though the people are very anxious for his release.[e]

A governor may banish to places under his jurisdiction; but not beyond these limits, unless he has the [24] Emperor's sanction.[f] He may, however, exclude a criminal from his province.[g]

Throughout the West thirty-one governors are listed in order in the treatise which I have often cited above—the *Report to Theodosius*. In *Novels*, viii, Justinian mentions the governors of many provinces. So in the common editions of the *Authenticum*,[h] and Haloander makes a much fuller report.[i]

And no one should be surprised to find that there was sent into the same province a superintendent, a duke, or a count, and with him a governor—either a proconsul or a praetor. For one group were military officials, the other civil. And they severally looked after their own departments. This system, however, Justinian found by experience to be disadvantageous to the provincials.[j]

And in our time we have seen the Emperor Charles send men into the Duchy of Milan to have charge of both the military and the civil administration, namely the Marquis del Vasto, Ferrante di Gonzaga, and lastly the Duke of Sessa. Again, at times we have seen such powers separated, so that one man had charge of the civil administration, and the other of the military; and the experience with these was about as described in the above citation from the *Novels*.[k] (It is there[l] mentioned that the insignia of a praetor are a curule[2] chair of silver, and fasces.)

[a] *Dig.* XLVIII. xix. 2, § 1.
[b] *Ibid.*, 8, § 9.
[c] *Ibid.*, 27, at the beginning.
[d] *Ibid.*, §§ 1 and 2.
[e] *Dig.* XLVIII. xix. 31.
[f] *Dig.* XLVIII. xxii. 7, § 1.
[g] *Ibid.*, §§ 6 and 10.
[h] VIII.
[i] [On *Novels*,] viii.
[j] *Novels*, xxiv. 1.
[k] *Ibid.*
[l] Chap. 4.

[1] [The reference is to gladiators.—TR.]
[2] [Various explanations of a slightly corrupt text seem possible here. The original of the *Novels* suggests the reading *currum ex argento* ('a chariot of silver').—ED.]

[24]

## CHAPTER XXII

### ON THE QUAESTOR

### SYNOPSIS

1 Quaestors; why so called.
2 The quaestor is 'illustrious'.
3 The quaestor is 'exalted'.
4 Various kinds of quaestors.
5 The quaestor's business and office.
6 Business of the quaestor transferred to the prefect of the treasury.
7 Quaestors in cases of parricide.
8 'Parricide' a term for simple homicide.
9 The proviso 'If the petitions are based on fact' should be added to a rescript. Otherwise the quaestor is remiss.
10 Quaestor the same as grand chancellor.
11 Quaestors by appointment (*candidati*) and chancellors.[1]
12 Dignity of the quaestor.

[a] *Dig.* I. xiii, 1.

[b] *Dig.* I. ii. 2, § 22.

[c] § 1.

[d] CXIV. 1.

[e] *On Dig.* I. xxi. 1, no. 6.

[f] So also *Authent.* LXXX (col. 6).

Ulpian[a] states that the quaestorship is the earliest of Roman magistracies, being introduced into the state by Romulus himself, or at any rate by King Tullus. The term itself indicates that quaestors 1 were named from the verb 'to acquire' (*quaero*); for it was their business to collect and also to take charge of money.[b] Hence their office is not unlike that of the official whom to-day we call the imperial treasurer.

In *Digest*, I. xiii. 1, it is stated also that the quaestorship is as it were the introduction and first step in office holding. But in *Authenticum* XVII, which is addressed to Tribunianus,[2] a quaestor and ex-consul, 2 he is honoured with the designation 'illustrious';[c] so in *Code*, XII. xix. 3 13, 14, and 15. Again, in the *Authenticum*[d] the Emperor calls a quaestor 'exalted'; but in *Code*, X. xii. 2 the term 'illustrious' is used.

Citing Baldus, Jason[e] recognizes three, or even four, classes of 4 quaestors; and some he rates as 'illustrious', and others as 'very highly distinguished'. See his statement. But in the treatise already very often cited above on Roman magistrates and the *Report to Theodosius* (where also their insignia are set forth), they are called 'illustrious'.

And it is stated that it was their business to formulate laws and 5 petitions; and that they have no suite, but call in such assistants as they need from the secretarial department, e.g. underhelpers and clerks. And in *Novels*, xxxv, it is said that a quaestor may appoint assistants in his room, and that the full number is twenty-six.

Again, in *Novels*, lxxx,[f] an additional quaestor is appointed by the Emperor to examine country people and other arrivals flocking into that city.

That the quaestor's business had to do with funds is shown, not

[1] [But see text below under this number.—Tr.]
[2] [For *Tribonianum* read *Tribunianum*; but the *Authenticum* itself varies in different editions.—Ed.]

only by the citations above made, but also by a passage in Cornelius Tacitus,[a] who has this to say: 'In the first instance, Valerius Potitus[1] and Aemilius Mamercus[2] were elected to attend the military department. As the amount of business increased, two quaestors were added to have charge at Rome. Subsequently, the number was doubled, Italy now being under tribute, with the provincial revenues also coming in.' Zasius[b] cites this passage, giving a reference as well to
6 Aulus Gellius,[c] who states also that the care of the treasury was later transferred from the quaestors to the prefects of the treasury.

(As I have remarked in its place, mention is made [**25**] of these prefects in *Digest*, XLIX. xiv. 42, and *ibid.*, 15, §§ 4 and 6. Following Budé, Joannes Pyrrhus says these officers are the same as those to-day known as chiefs of finance.[3])

7 There were also quaestors in cases of parricide, as was stated by
8 Zasius. (He adds that the ancients put any sort of homicide under this designation.[d]) It was perhaps in this sense that Virgil said:

The *quaesitor*[4] Minos shakes the urn.

I have said above that it was the quaestor's business to formulate
9 laws and petitions; and in this sense the word is used in *Code*, I. xxiii. 7, where the quaestor is subject to censure if he allows rescripts to leave the court without attaching the proviso: 'if the petitions are founded on fact'.

10 Again, a gloss there states that the quaestor is the officer to-day known as 'chancellor'. This Joannes Montaigne[e] understood of the grand chancellor commonly appointed by the highest rulers to manage their business. And in this meaning the word is found also in *Digest*, I. xiii. 1 and 2.

The last cited law shows that some quaestors were of higher rank than others; and that some cast lots for provinces, and that others did not. This was stated, too, by a glossator on *Code*, X. xii. 2. Those who
11 did not cast lots for provinces were appointees (*candidati*) of the Emperor.[f]

(Aside from our purpose is what Vegetius[g] has to say on the subject of *candidati*, namely that, in the distribution of supplies, there were imperial troops (*candidati*) who received double portions, while the others received single portions. The former, he says, are soldiers of the Emperor of the privileged class (*privilegiis muniuntur*), whereas the rest of the soldiers are called 'service renderers' (*munifices*), because they are obliged to render service (*munera*). Possibly the quaestors called *candidati* were exempt from the duties of the quaestorship, but enjoyed its privileges and honours.)

[a] [*Annals,*] XI. [xxii.]

[b] *On Dig.* I. xiv. 2, word *Quaestores.*

[c] XIII. xxv. [30].

[d] *On Dig.* I. xiv. 2.

[e] *De Auctoritate . . . Magni Concilii, &c.*, no. 5.

[f] *Dig.* I. xiii. 1.

[g] *Rei Militaris Instituta,* II. vii.

[1] [For *Posthumius* read *Potitus.*—Ed.] [2] [For *Emilius Mamereus* read *Aemilius Mamercus.*—Ed.]
[3] [For *finantia tum* read *financiarum.*—Tr.]
[4] [i.e. 'judge'. Note the difference of spelling. The citation is from Virgil, *Aeneid,* VI. 432.—Tr.]

Those who wish to pursue the subject further should consult Joannes Pyrrhus.[a] Still better, they might refer to Lucas de Penna, who lauds this office to the skies,[b] if indeed it be worthily conferred. For, he says, the quaestor is the counsellor of the Emperor, the guide 12
and controller of his procedure; in fine he calls him the Emperor's mouthpiece, able fitly to voice the sentiments of the latter. He states that the quaestor suggests imperial policies to the Emperor; and that his words determine the Emperor's conscience, and his fame and reputation. Those, therefore, upon whom such honours are conferred should study to make their tenure an ornament and not a disgrace to the office.

[a] *De Magistratibus Romanis*, Pt. II.
[b] *On Code*, rubric, XII. xvi

## CHAPTER XXIII

### ON THE OFFICE OF PROCURATOR OF THE EMPEROR

### SYNOPSIS

1 Procurator of the Emperor.
2 Procurator of the fiscus.
3 Chief of finance.
4 Advocate of the fiscus.
[25'] 5 Steward.
6 The chief of finance is the head of accountants.
7 Procurator of the Emperor; his powers in the administration of justice.
8 Procurator of the Emperor; what cases he tries.
9 Interpretation of *Code*, IV. xv. 3.
10 *Code*, X. iii. 5 interpretated otherwise than by Accursius and the other Doctors.
11 Acts forbidden a procurator of the Emperor.
12 The advocate of the fiscus should be in attendance when fiscal cases are tried.
13 A verdict is sometimes invalid.
14 Fiscal agents operate with nets.
15 Punishment of fiscal agents, if they are abusive and unjust.
16 The fiscus like the spleen.
17 Advocates of the fiscus a necessary evil.

I HAVE been in doubt whether to speak of the procurator of the 1
Emperor, or of the fiscus; for these officials are scarcely to be reckoned in the category of soldiers, with whom alone my treatise deals (with a gloss, it could truly be said of them that their fighting is like that of whelps in the woods). But since I have stated above that all those are in the military service who attend upon the Emperor and minister to him, I should not pass over in silence even this officer.

I find him designated in the laws as procurator of the fiscus, 2
elsewhere as chief of finance, advocate of the fiscus, and steward— 3
though I am not unaware that the duties of these were varied and 4 5
separate, especially those of the procurator of the fiscus and the procurator of the Emperor, as is stated in a gloss.[c]

However, very frequently you will find 'chief of finance' put for procurator of the Emperor.[d] (Further, that 'advocate of the fiscus' is

[c] *On Code* II. xxxvi. 3 [1]; and II. xxxvi. 2 and 3.
[d] *Code*, III. xxvi. 5; II. xxxvi. 3; X. ii. 3.

used of the procurator of the fiscus, and vice versa, is stated in a gloss on *Digest*, XLIX. xiv. 3, § 9 last line. And other titles too are used promiscuously.)

6 Joannes Pyrrhus[a] stated that the chief of finance is to-day the head of accountants, and that such officers were called by Justinian prefects or presidents of the treasury.

[a] *De Magistratibus Romanis*, Pt. II.

7 Cornelius Tacitus[b] writes as follows of the procurator of the Emperor. Augustus, he says, had ordered that justice be administered by the knights who governed Egypt, and that their decisions should have the same weight as if rendered by the Roman[1] magistrates. Subsequently in other provinces and at Rome many cases were referred to the procurators which at one time had been handled by the praetors. Claudius gave the former full jurisdiction, and put the freedmen whom he had set over his affairs upon a par with himself and the laws; [**26**] and he directed that the validity of the judgements rendered by his procurators should be the same as if he himself had made the decisions. This too is what Ulpian said.[c]

[b] [*Annals*, XII. lx].

[c] *Dig.* I. xix. 1.

8 The procurator of the Emperor acts as judge in cases between private parties and the fiscus[d] (being called 'chief of finance' in *Code*, X. ii. 3); but he does not sit in a case involving private citizens only.[e] Both these points are covered by *Code*, II. xxxvi. 2. However, the jurisdiction of this officer may be extended;[f 2] and perhaps that is the 9 meaning of the Emperor's ruling[g] that in case a person in debt to a fiscal debtor does not disclaim the liability, he may be forced to payment by the procurator of the Emperor; but if he contests the claim, this procedure is not allowable—though Baldus here interprets otherwise, saying, in comment on the law cited, that in accordance with the standing of the person indebted to it, the fiscus appoints a suitable judge. But this is not in harmony with *Code*, III. xxvi. 4 and the gloss thereon.

[d] *Code*, II. xxxvi. 1 and 3; VII. lxxiii. 4 and 6; X. ii. 3.

[e] *Code*, II. xiii. 1.

[f] *Ibid.*

[g] *Code*, IV. xv. 3.

The procurator of the Emperor sits also in cases that are purely fiscal,[h] but in company with the governor, as a gloss here[i] holds on the basis of *Code*, II. xxxvi. 2, which also calls for the presence of the advocate of the fiscus.

[h] *Code*, III. xxvi. 5.

[i] *Ibid.*

Likewise, he sits in cases pertaining to the crown colonists (see *Code*, III. xxvi. 7—if the introductory phrase 'to the chief of finance' is genuine—though a gloss there takes it of the prefect), unless a criminal process is to be set in motion against the colonist in question. For in that case the governor of the province presides, but with the chief of accounts in attendance.[j]

[j] *Code*, III. xxvi. 8.

Furthermore, a gloss[k] states that the procurator's concern is with the most important cases, and, in another version, that his field is the largest business transactions. But in *Digest*, I. xix. 1, it is ruled that

[k] *On Dig.* I. xix. 3.

[1] [For *Romam* read *Romani*.—Tr.]

[2] [For *praerogari* read *prorogari*.—Tr.]

he may not dispose of the Emperor's property, but must administer it diligently, though there is an apparently contrary ruling in *Code*, X. iv. 1 and VIII. xlv. 1. A gloss[a] harmonizes the rulings thus: The procurator of the Emperor may not sell, though a procurator of the fiscus may do so. This view is favoured by a gloss on *Code*, VIII. xlv. 1, which explains the phrase 'my procurator' as meaning procurator of the fiscus.

[a] *On Code* X. iii. 1.

My own view is that we may say more simply and without qualification that neither of these officials may sell property belonging to the Emperor or to the fiscus; but that either may sell the property of debtors to the fiscus. See the case in *Code*, X. iv. 1, and VIII. xlv. 1; so too the case in *Code*, X. iii. 5, where it is directed that property be sold to cover the delinquent taxes of wasteful persons —by which expression I understand officials in charge of the grain tax and collection who have wastefully administered the same— though the glossator otherwise understands the phrase 'wasteful persons' (*prodigorum*). 10

Again, the procurator is forbidden to sell property that is in uncertain status;[b] so things mortgaged or given as security.[c] However, should he so sell, even though he promises [**26′**] two- or threefold in case of dispossession, he[1] is liable only for the original amount.[d] 11

[b] *Dig.* XLIX. xiv. 22, at the beginning.
[c] *Dig.* XLIX. xiv. 22, § 1.
[d] *Dig.* XLIX. xiv. 5.

But perhaps he will sell things of a perishable nature;[e] and I should take the same ground with reference to an unprofitable slave, unless the latter be a deputy.[f] This principle is gathered from *Digest*, XLIX. xiv. 46, § 7.

[e] Cf. *Dig.* XXXVI. i. 23, § 3.
[f] *Dig.* XLIX. xiv. 8 and 30.

However, a procurator of the Emperor does not sit in criminal cases, if it be a question of punishment; but he may, if the property of the defendant is in question. For both points see *Code*, III. xxvi. 1 and 2. Nor does he sit in cases involving status,[g] though the ruling of *Code*, III. xxii. 5 seems in conflict with this. A gloss[h] reconciles in four ways; and of these the fourth is generally accepted, namely, that if it is a question of real free birth or slavery, the procurator does not preside; but he may, when it is a question of status as freedman or slave. And perhaps the logic of this is that a person who confesses himself a freedman thereby certainly admits that at one time he was in a state of slavery; hence the issue raised is not so vital.

[g] *Code*, III. xxii. 2; VII. xxi. 7.
[h] *On Code*, III. xxvi. 1.

Furthermore, the procurator may not impose fines,[1] and far less may he decree banishment.[j] But, for sufficient reason, he may exclude certain people from a definite locality; but having once banned a person, he may not allow his return.[k2]

[1] *Code*, I. liv. 2.
[j] *Dig.* I. xix. 3.
[k] *Ibid.*

Of the advocate of the fiscus, it is said that he should be in attendance in criminal cases involving the fiscus;[l] and if he is absent, 12 13

[l] *Dig.* XLIX. xiv. 3, § 9; *Code*, II. xxxvi. 1 and 3; X. x. 5; II. viii. 4.

[1] [In the *Digest* reference, *fiscus* is the subject of this clause.—Tr.]
[2] [See, however, the text of the *Digest*.—Tr.]

a verdict for the fiscus holds, but a verdict against it is void.[a] And an information cannot be laid without reference to the advocate of the fiscus.[b]

(An advocate is bound to carry through a fiscal case once undertaken, even though he has not been paid the salary agreed upon.[c] And he may appear in cases against the fiscus, even though at another time he has been advocate for the fiscus—but not in one and the same case.[d])

The advocate of the fiscus also must beware of concealing matters advantageous to the fiscus, and of bringing false charges against private parties in the name of the fiscus.[e]

Jacobus de Belvisio[f] rails against the court chiefs of finance (who for the most part, as the saying is, are looking for the knot[1] in a bulrush),
14 and dubs them 'highwaymen'.[2] And that they operate with nets (which, however, they spread for doves and not for kites) is the charge of Claudius Cantiuncula,[g] who alludes to the well-known verse:

Pardon for the kite, harsh measure for the dove.[h]

15 In any case, all the procurators above referred to should beware of subjecting the provincials to insult or loss; for if convicted of such practices they are condemned to be burned alive.[i]

16 Moreover, the Emperors should follow the lead of Trajan, who compares[3] the fiscus to the spleen,[j] in proportion to the abnormal growth
17 of which the other [27] members dwindle. And they should regard the advocates of the fiscus as a necessary evil, as did Alexander Severus.

[a] *Dig.* XLIX. xiv. 7 and 3, § 9, with gloss.
[b] *Code,* X. x. 5 [X. xi. 5].
[c] *Code,* II. viii. 1.
[d] *Code,* II. viii. 2.
[e] *Code,* II. viii. 3.
[f] *Practica Iudiciaria,* &c., no. 15.
[g] *De Officio Iudicis,* tit. *De Mero Imperio,* no. 29.
[h] [Juvenal, *Satires,* II. 63].
[i] *Code,* III. xxvi. 9.
[j] [Ps. Aurelius Victor, *Epitome de Caesaribus,* xlii, at end].

## CHAPTER XXIV

### ON REFERENDARIES

Finally, referendaries served at the imperial court. In regard to them a title will be found in the *Authenticum*;[k] and the nature of their office is made clear by another passage in the same,[l] where we thus read: 'For we allow them to do nothing beyond transmitting our directions only—whether in writing or otherwise—to regular or appointed judges. And if they presume at all beyond this, it entails the loss of the belt'.

Their duties, therefore, are in close accord with their name, i.e. being referendaries (*referendarii*), they 'report' (*refero*), and make this their business.[4] Other details as to their number and employment

[k] X.
[l] *Authent.* CXXIV. iv.

[1] [For *nedum* read *nodum*. The proverb (as here applied) means that these officials manufacture occasion when there is none. For the quotation cf. Plautus, *The Menaechmi,* 247.—Tr.]
[2] [If *Crassatores* is for *Grassatores*.—Tr.]
[3] [For *comprobat* read *comparat*.—Tr.]
[4] [For *carent* read *curent*.—Tr.]

you may find at your pleasure in the chapter above cited.[a] There you will note, further, the courtesy of the Emperor.

[a] *Authent.* X.

For though he found the number of referendaries to be greater than convenient, he was unwilling to discharge any, for fear of bringing disgrace and disaster upon innocent persons. He stipulated merely that no one should be appointed to fill the room of those who died, until the total fell to a number prescribed.

END OF PART I.

[27]

HERE BEGINS
THE SECOND PART OF THE WORK

# CHAPTER I

## GROUNDS FOR DECLARING WAR

## SYNOPSIS

1 Unjust wars are brigandage.
2 The prerequisites for just warfare.
3 There is no peace apart from justice.
4 Safety is not in sword and spear.
5 Defence of the indefensible is not lawful. Again: Things captured in an unjust war do not become the property of the captors.
6 Wars are waged for the purpose of securing a habitat.
7 War for country and glory.
8 The Gauls invaded Italy because of its wine and crops.
9 War to ward off injury.
10 Force may be met with force.
11 It is lawful for Christians to go to war.
12 Rules for Christian soldiers.
13 War allowable for country and for sovereign.
14 To go to war for plunder is not permissible. So no. 15.

ALL good men agree that wars are to be undertaken only for reasons
1 that are at once serious and cogent and just. Hence Baldus[a] declared
2 that unjust wars are sheer brigandage. And again he says[b] that for a just war five things are prerequisite: these are a just person, a just matter, a just cause, a just intent, and due authority. This he copied from Hostiensis, who says the same thing.[c] However, these five prerequisites are reduced to three by Astensis[d] and by [28] Cardinal Cajetan[e] (namely, to person, cause, and intent—as elaborated by both in the passages cited). So all the canonists.[f] And it would be possible to limit even to two of the above—person and cause; for the former includes intent and authority, and the latter includes matter and cause.

For although Baldus[g] says that in war the justice of might may be one thing and the justice of cause quite another, I do not believe that one can be separated from the other; for war is not made at all, if the power is wanting; and it should not be made if just cause is lacking.
3 For in war there is no other objective than peace, and there is no peace apart from justice[1]; as the Psalmist says: 'Righteousness and peace have kissed each other.'[h]

Rulers, then, should have before their eyes and in their hearts that
4 which is written:[i] 'The battle is the Lord's', and 'The Lord saveth not with sword and spear' those who fight. Moreover, they should be warned to take to heart the fact that the Lord will be their judge; and that he who engages in an unjust war is in duty bound to make good, and render satisfaction for, all losses suffered either by his own people or by the enemy. So said Innocent,[j] who is cited and followed by Martinus Laudensis.[k] And this applies as well to a person who defends

[a] *On Feuds*, Bk. II, tit. XXVIII, chap. i, no. 6.
[b] *Consilium* 439 (beginning: *Ad bellum iustum*).
[c] *Summa*; tit. *De Treuga et Pace*, § *quid sit iustum*, words *sunt tamen qui dicunt*.
[d] *Summa*, I, xxix.
[e] *Summa*, word *bellum*, near beginning.
[f] *On Decretals* II. xiii. 12; II. xxiv. 29.
[g] *On Decretals* II. xxiv. 29.
[h] [*Psalms*, lxxxv. 10.]
[i] 1 *Samuel*, xvii [47].
[j] *On Decretals* II. xxiv. 29; I. xl. 7.
[k] *De Bello*, qu. 14.

[1] [For *institia* read *iustitia*.—ED.]

himself against the claims of justice, as to one who is aggressive in his injustice, as Baldus[a] well remarked. And Calderinus[b] declared that in such a case it is not permissible to defend even one's own country. 5

Further, they should remember to what great cares and perils they expose soul and life because of the dangerous and uncertain issues of war. And they should also have before their eyes the Cardinal's statement[c] that things captured in an unjust war, whether cities or other things, do not become the property of the captors, but must be restored. And on this ground the same writer assumes that confessors who absolve such persons are in the wrong, and that in throngs they are all on the road to perdition. And he adds that in this matter a *praescriptio* [*longi*] *temporis* does not hold.

Furthermore, being Christian rulers, they should understand that, even when they have undertaken war for just cause, as soon as they have realized enough from the war fully to indemnify themselves for the occasion that gave rise to hostilities, they should terminate the war. (On that point there is a gloss[d] which is discussed at length in the *Summa* of Tabia.[e]) But this I do not insist upon, because Baldus[f] takes the other view, even with the support of theologians.

Again, Calderinus[g] stated that even when war is declared on just grounds, if it is waged ruthlessly and with a view to vengeance, it thereby becomes unlawful, so that things captured may not rightly be retained.

However, no one ventures to oppose a sovereign; and adulation is more acceptable and expedient than candour. [28′] No wonder, then, that very frequently the ruler's caprice is counted a just cause for making war.

But, to come now to the causes of war, who could easily catalogue them? Or who could recall all the peoples who in the long ages of the past, with a view to finding a new habitat (either weary of old familiar scenes, or forced to leave them) have drifted about like a swarm of bees, attacking savagely any who lay in their way, thinking this their[1] right under the law of nations?[h] 6

Thus it was that the Jewish nation left Egypt for Syria and Palestine; so, much later, the Cimbrians invaded Gaul and Italy, though opposed with better success. Again, some years afterward, the Helvetians entered Gaul above mentioned, meeting about the same fate. So Ariovistus[2]; and, in that same period, the Usipites and Tencteri[3]. Thus (with greater loss to Italy and in fact to the whole world) the Goths, Vandals, Alani, Huns, and Lombards brought ruin and devastation to many a province. So the far-famed Tamerlane within the recollection of our great-grandfathers, like a resistless torrent,

[a] *On Feuds*, Bk. II, tit. XXVIII, chap. i, no. 5.
[b] *Consilia*, I, *De Treuga et Pace*, col. 2, words *ego dico*.
[c] *On Decretals* III. xxxiv. 8.
[d] *On Decretum* II. xxiii. 2. 2.
[e] *Summa Summarum*, word *bellum*, § 7, latter half.
[f] *On Feuds* Bk., II. tit. XII, no. 8, words *sed numquid quod capitur*.
[g] *Consitia*, I (above cited), col. 2.
[h] See also *Decretum*, I. i. 9.

[1] [For *idsibi* read *id sibi*.—ED.]
[2] [For *Arionistus* read *Ariovistus*.—ED.]
[3] [For *Teneterii* read *Tencteri*.—ED.]

overran and outraged all Asia Minor. And to the great loss and disgrace of the Christian name, even greater success attended Othman; for emerging either from Scythia or Persia, and accompanied by many peoples drawn on by the lure of loot and plunder, he fought to such purpose and reached such a point of success that no greater realm than his has been seen or heard of since the days of the Roman Empire.

And those wars are most desperate of all, where the struggle is not for empire or for glory, but for altars, for home fires, for children and wives, and in fine for life itself. For, as Cicero says[a], it is then not a question which party is to win, but which is to survive. Of this general character were the wars which the kings of Assyria are recorded[1] to have waged against the Jews,[b] carrying away the conquered to far distant lands.

7 We read also of not a few wars waged for empire and for glory, for example, the wars of those first world conquerors, the Chaldaeans and Assyrians, then of the Medes and Persians, so also of the Macedonians and Greeks. These victors deposed rulers and set up others, but showed mercy to the residue. And on this principle Pyrrhus thus waged war with the Romans—according to Ennius,[c] putting only this one point to the test:

> Whether to you or me Dame[2] Fortune wills control.

Thus, too , in their turn the Romans carried on war with Latium and the other districts of Italy, with the Gauls, the Carthaginians, and the Macedonians; also with Antiochus and Mithridates.

But why search further for causes, when the *Iliad* is filled with the story of Europe and Asia in the grip of a mighty conflagration, all on account of a mere wanton?—another poet thus commenting:[d]

> Ere Helen's time was woman's lure the direful cause of war;
> But perished they in deaths[3] unsung . . .

8 And why multiply causes when Livy[e] states that in the first instance the Gauls crossed over into Italy because they were captivated by the richness of its wine and crops?

9 More righteous are the [29] wars that arise from the desire to escape injury, or even to avenge the same,[f] whether a person is righting a wrong done to himself, or to some other—his ally, friend, or associate.
10 Surely nature teaches us to oppose force with force, and arms with
11 arms.[g] And this applies to Christians as well as to other peoples.

If this were not the case, John, that man most acceptable to God,
12 would not have counselled the Roman soldiers (who came to him anxious about their salvation) 'to be content with their wages, to do violence to no man, and to accuse none falsely'—[this he would not have

[a] [*On Duties*, I. xxxviii].

[b] 2 *Kings*, xvii [5 ff.].

[c] [*Annals* VI. 197, V.]

[d] [Horace, *Satires*, I. iii. 107 ff.]

[e] V [xxxiii. 2].[4]

[f] See *Decretum*, II. xxiii. 2. 1.

[g] *Dig.* I. i. 3; and *Decretum*, II. xxiii. 1. 1.

[1] [For *narratur* read *narrantur*.—Ed.] [2] [*Hera* probably is for *hera*, i.e. *era*.—Tr.]
[3] [The text of Horace has *mortibus* in place of *viribus*.—Tr.] [4] [For *pe.* read *pr.*—Ed.]

done, I say] unless, through following this advice, they would themselves find salvation.[a]

[a] See *St. Luke*, iii. [14]; *Decretum*, II. xxiii. 1. 2, § 5.

Truly his was a short rule, easy to repeat, and suitable for soldiers, who dislike long rules and regulations. But it is very hard to put it into practice, and not many observe it. For the soldiers of our day, careless of salvation (being persons who either do not believe in God or do not fear Him), make a business of plundering and all sorts of outrage. And justly they are excoriated by Lucas de Penna[b]—always excepting those who are good.

[b] *On Code* XII. xxxv. 1.

And inasmuch as it is permissible to fight on one's own behalf, much 13
more may we do so to save the state, i.e. in defence of liberty and fatherland. Hence this word of the poet:[c]

[c] [Virgil, *Aeneid*, VIII. 648.]

'Gainst levelled steel, for liberty, the Trojans forward surged.

So another bard:[d]

[d] [Horace, *Odes*, III. ii. 13.]

A joy and splendour it is to die for country.

And the commoner word of the sage: 'Battle for the fatherland'—a half-verse[1] which Baldus did not scorn to quote.[e]

[e] *De Pace Constantiae*, i. 9.

And no less should arms be taken up for one's king, Emperor, or 14
lord. For he is the guardian and mainstay of the public weal, now that it has seemed wise that government be vested in one individual.[f] Consequently, we must reverence and protect him, just as we should the fatherland, inasmuch as the sovereign is a common parent to all,[g] and his power has not been established for naught.[h]

[f] See *Dig.* I. ii. 2, § 11; I. iv. 1.

[g] See *Authent.* XCVIII, near the end.

[h] *Decretum*, II. xxiii. 5. 18, 20, and 23.

And, in such a war, the person who kills a man will not be guilty of homicide in the sight of God. So *Decretum*, II. xxiii. 5. 13; and Augustine, writing to Boniface, says:[i] 'Do not think that none are acceptable to God who serve with the arms of war. For David, a man after God's own heart, and the centurion whose faith is commended by divine word,[j] and many other very righteous people have engaged in war.'

[i] *Decretum*, II. xxiii. 1. 3.

[j] [*St Matthew*, viii. 8–13.]

And in another passage Augustine states[k] that it is no wrong to go 15
to war; but that it is a sin to do so for plunder. And he adds that even killing is not blameworthy in war; for those who thus lose their lives are bound to die sometime; so that he who condemns [29′] killing, or shrinks from it, is not so religious as faint-hearted. But, says he, we should frown upon delight in injury, ruthlessness in vengeance, an implacable spirit, lust of empire, and other such things.

[k] *Decretum*, II. xxiii. 1. 4.

[1] [For *emistichion* read *hemistichium* or *hemistichion*.—Ed.]

## CHAPTER II

### WHETHER ONE SHOULD ALWAYS OBEY HIS RULER'S CALL TO ARMS

### SYNOPSIS

1 Under what circumstances one should obey his ruler's summons[1] to war.
2 One should not obey his ruler in defiance of the laws of God.
3 Whether a vassal is bound to serve his lord in an unjust war.
4 A soldier serving in an unjust war is liable for losses inflicted upon the enemy.
5 Soldiers who at the sound of the drum rush to a war, without regard for its justice, are clearly in a lost state.
6 Defensive warfare is not lawful for one against whom war has been justly declared.
7 A ruler may not force a subject or vassal to render him service in war, if the war is manifestly unjust.

1 We now take up the question whether there should be unquestioning obedience to a ruler, even though he is waging an unjust war. And Augustine[a] has this to say: 'The decision and authorization for making war lies with the ruler; and if from carnal passion he wages war, this affects not the righteous'. And a little later he adds: 'There is no power except from God, who either bids or allows. Accordingly, if a righteous man chances to serve under a wicked king, it is right for him to fight under the latter's directions; for the unrighteousness of his orders may bring the king into condemnation, but the rule of service exonerates the soldier' (he adds, however: 'unless the king orders 2 something that is contrary to the law of God').

Further support for this view is found in *Decretum*, II. xi. 3. 94, where it is said that though Julian was an apostate, he yet had under him Christians, who were obedient when he directed them to take up arms. (A gloss there is irrelevant, which states that this was condoned by the church in order to avoid controversy. For at that time the church had no standing in secular courts, as appears from the chronicles and the statement of Felinus.[b])

But the jurisconsults, following a gloss,[c] declare that when the 3 injustice of a lord is clear and manifest, a vassal is not bound to assist the lord; [30] so all comment.[d] And though it might easily happen that a vassal thus puts himself in peril, there is no escape from the rule 'We ought to obey God rather than men'[e]; for it is a question of right and wrong, and not of expediency or inexpediency. If, however, the injustice of the lord is not established and the soldier is a subject of this ruler, obedience must be rendered when the latter calls. But if the

[a] *Decretum*, II. xxiii. 1. 4.

[b] *On Decretals* I. xxxiii. 8, col. 1.
[c] *On Feuds*, Bk. I, tit. v, chap. i.
[d] *Ibid.*
[e] *Acts*, v [29].

[1] [For *vacanti* read *vocanti*.—Tr.]

soldier is not a subject, it is safer for him to keep out of the war. So Baldus[a] and Panormitanus.[b]

Otherwise, in fact, a soldier is liable to the enemy for the losses 4
he inflicts upon them, according to the comment on *Decretals*, I. xl. 7: furthermore, if he himself suffers loss, he has no action against the person whom he is serving, for both are engaged in unlawful enterprise, and action is not allowed with respect to something disgraceful and illegal.[c] But if his service had been rendered in a just war, as a mandatee he would have ground for action against the lord to recover for the loss sustained.[d]

Volunteers—to-day the most numerous class—should beware, therefore, of putting themselves in jeopardy—not so much because of the danger of loss of action (this procedure being to-day obsolete), as because of peril to their souls; for, as I have said, it is not lawful to serve in an unjust war. They should follow rather the advice of Alciati,[e] who urges that they leave an unprofitable service in preference to becoming thieves and losing the favour of God. Would that these words of ours might not fall upon unheeding ears.

Furthermore, the mercenary soldiers, too, should have a care—who, as Cardinal Cajetan[f] says, the instant they hear the mention and tumult of war, rush to the clinking coin, with never a thought about 5
justice or injustice. For such, he says, are manifestly doomed to endless perdition, if they do not reform. So also said the Archbishop of Florence,[g] whose *Summa* is quoted and followed by Tabia.[h] According to them, such soldiers should not be absolved, unless they renounce their calling, or at any rate turn to the service of justice.

Yet there are some who hold that, even in an unjust war, vassals and subjects are bound to protect their lord from injury and to defend him, though not obliged to aid him in aggressive warfare. So Baldus[i] said; on this see also Jacobinus de Sancto-Giorgio.[j] Again a passage with like bearing is found in the *Feudorum Libri*,[k] wherein Obertus de Orto and Gerardus Capagistus[l] are quoted as saying: 'Let the vassal aid his lord, to the extent of defending him; whereas in case of offensive 6
operations against another, he may aid him if he so chooses.'

For my own part I doubt the soundness of this, in view of the mixed character of wars, which in part bring force to bear and in part resist it, i.e. they are partly aggressive and partly defensive. And since it is a question of the permissible and the not permissible, it can hardly be that it is permissible to resist a party enforcing his right under the law of [30'] nations. Again, on hardly any grounds are the peoples of an offending king fair plunder for the enemy, unless it be that they support him in his iniquity and uphold a wrong cause (for that man is not less guilty who supports another who does wrong than is the person who commits the wrong[l]. Whence also it is stated[m] that he

[a] *On Feuds*, Bk. I, tit. v, chap. i, col. 3, no. 4.
[b] *On Decretals* II. xxiv. 29, el. 3, col. 6.
[c] *Dig.* XVII. i. 22. § 6; and XVII. i. 6, § 3; so Panormitanus, *On Decretals* II. xxiv. 29, no. 16.
[d] See Innocent, *On Decretals* II. xxiv. 29, and Panormitanus, *ibid.*, qu. 5.
[e] *On Code* I. ii. 11.
[f] *Summa.*
[g] *Summa*, Pt. III, tit. IV, chap. ii, § 1.
[h] word *bellum*, § 6, at the end.
[i] *On Feuds*, Bk. I, tit. v, chap. i, no. 4.
[j] *Investitura*, gloss, words: *Et promiserunt domino praestare debita servitia*, qu. 5.
[k] II. XXVIII. i, near the beginning.
[l] *Decretum*, II. xxiii. 2. 2, and II. xxiii. 4. 6.
[m] *Decretum*, II. xi, 3. 100.

[l] [So in *Feudorum Libri*. Belli has *Cagapistus*.—ED.]

who protects an evildoer should himself be dealt with more severely than the one who commits the wrong). And, finally, I feel doubt because it is impossible that when two kings or two peoples are at war, both parties should justly be so engaged—an example of the argument from contraries. My dissent is confirmed by the statement of Bartolus[a] on the case of a person banished, to the effect that where attack is justified there can be no lawful defence.

And although in the rebuttal which in this connexion he formulates on the basis of *Digest*, IX. i. 1, § 11, he distinguishes between natural law and the law of nations—saying that in the one case it is permissible to act on the defensive and to ward off attack, whereas it is not permissible in the other—I fancy that under the first head he is speaking, not of the law that differentiates the just from the unjust, but of the law, i.e. the natural instinct, inborn in living creatures, which bids them cling to life and, therefore, to save themselves in any way they can.

To this view Baldus[b] seems to incline, implying thus that the aforementioned Obertus and Gerardus were merely two animals, having no regard for the civil law, the law of nations, or the divine law; for, says he, unjust wars are open outlawry. This I have stated above also, and the view is supported by what is there said, with citation of Calderinus,[c] who declares that it is not permissible to defend even the fatherland against war justly declared. This same statement was made also by Cardinal Cajetan,[d] who quotes *Decretum*, II. xi. 3. 97.

But, whatever the distinctions drawn by the Doctors, it would be a perilous thing for vassals and subjects to pry into motives. And it is the safer plan to follow the orders of their lords, whether the wars be offensive or defensive. De Afflictis, following d'Isernia,[e] inclines to this view. And although Lucas de Penna[f] (who is likewise cited by de Afflictis on the *Feudorum Libri*,[g] where he takes up this subject again) seems to distinguish between vassals and subjects, and between cases when kingdoms are threatened by barbarian invasion, and when some other less perilous issue is involved, yet I think it the safer course to accept without qualification the rule above set down, namely that subordinates should follow the orders of their lords; and this harmonizes with the view of St. Augustine.[h]

There is confirmation also in the statement of Baldus[i] that in case of doubt it is to be presumed that kings are warring against one another in accordance with the law of nations; and though the war may be unjust as regards the prime mover (i.e. the king), yet the fact of compulsion makes it lawful as regards his subjects; for the lord is an administrative person who must be [31] obeyed. He adds, however, that this holds good in the eye of the law; but that the case would be otherwise in the court of conscience, when subjects do violence to their sense of right. Thus Baldus.

[a] *On Dig.* I. i. 3, following a gloss there.

[b] *On Feuds*, Bk. II, tit. XXVIII, chap. i, at the beginning, nos. 5 and 6.

[c] *Consilia*, I (above cited), *De Treuga et Pace*.

[d] *On the Constitutions of Clement* II. xi. 2, § *ceterum*.

[e] *On Feuds*, Bk. I. tit. V, chap. i (above cited), col. 3, words *quid autem si est dubium*.

[f] *On Code* XI. lv. 1, col. 3, near end.

[g] II. XXVIII. i, at the beginning.

[h] *Decretum*, II. xxiii. 1. 4.

[i] *Consilia*, II. 358 (*Licet latrunculis*).

But the same writer again says[a] that, when a war is unjust, lords 7
may not force subjects to aid them. However, my view is that the man will not go wrong who urges this point upon the lord, while advising the subject (to repeat for the third time) that he obey without question, unless the ruler's injustice is flagrant.

[a] *Consilia*, I. 483 (*Magnificus*), no. 4.

## CHAPTER III

### THE EXTENT OF A VASSAL'S OBLIGATION TO HIS LORD IN WAR

### SYNOPSIS

1 In what cases a vassal is excused from rendering military service.
2 To which shall a vassal of two rival belligerents render service?
3 A liege vassal should give his lord preference over all.
4 A vassal holding a fief may not accept a liege fief from another lord.
5 How shall a vassal proceed who does not know which lord has the earlier and older claim?
6 When the vassal of a vassal should serve the overlord.
7 Interpretation of the rule 'A vassal of my vassal is not my vassal'.
8 Subvassals are not required to swear allegiance to the overlord.
9 However, there are exceptions; which see.
10 The heirs of a vassal are not bound to render service in full[1] to the lord.
11 The vassals of a duke will serve the king (who is lord of the duke), and not the duke against the king.
12 In a general war a vassal should serve the overlord; in a private quarrel he will serve the local lord.

We must recognize, however, that a vassal is not bound in a general and indiscriminate fashion to the service of his lord in war. For, in the first place, there is exception in the case of a free fief, according to 1
Baldus[b]. For, says he, 'free' signifies the same as 'independent'—with due allowance for points specified in the investiture. (If, however, the vassal is bound to serve in some case, it would be at the expense of the lord, and not at his own. So Baldus here, followed by others; and the original statement was made by Oldradus.[c] Discussion of the free fief [**31**'] is found also in the writings of Curtius.[d])

In the second place, there is exception if a vassal has previously 2
been invested with a fief by another lord, and the two lords go to war against one another. For in that case the vassal will render service to the prior lord with person and counsel, but not to the second (for counsel is not divisible); and he will give financial support to both, according to the nature and character of the fiefs. So Baldus[e]—who, however, adds one point not to be forgotten, namely, that a vassal who undertakes feudal obligation to a second lord must inform him regarding the prior lord, and stipulate that the latter's right be not infringed

[b] *On Feuds*, Bk. II, tit. li, chap. i, at the beginning, no. 17.

[c] *Consilium* 234 (*Factum tale est, quidam miles*).

[d] *Tractatus Feudorum*, Pt. I, qu. 8, col. 9.

[e] *On Code* VI. li, sole law § 9, near the end, words *habeo duo feuda*: and on *Feuds*, Bk. II, tit. xxviii, § 4.

[1] [For *insolidum* read *in solidum*.—Ed.]

(this is mentioned also by a gloss on the last citation); otherwise the vassal is bound to support the second lord.

And regarding a vassal who has two lords by virtue of holding different fiefs Baldus discourses a second time,[a] stating that the vassal must send support to each of the lords in accordance with the character of the fiefs and the property which he holds from each. As for personal service, he says, the vassal will choose according to his conscience, serving either the lord who is clearly in the right, or the one higher in rank (as sometimes happens); but within the fiefs he will serve the prior lord.

[a] *Consilia*, III. 314 (*Ista quaestio*).

And again Baldus treats this subject at greater length,[b] stating that
3 in the case of a liege fief the vassal must not fail to support his lord, even though the latter be not prior—otherwise the lord may say to him 'He who is not with me is against me'. (You will find here a lengthy discussion of the liege fief.)

[b] *Consilia*, II. 291 (*Ad evidentiam praemittendum*), col. 2, near end.

Baldus makes further reference to this topic in his *Consilia*,[c] where he states that a vassal owing equal allegiance to two lords will give the preference, in the matter of personal service, to the one whose cause is more manifestly just.

[c] III. 313 (*Ista quaestio*), at end.

And here another question arises: A person is invested by a duke with one fief; later he chances to succeed to an agnate of his in another fief which has long been in the family, and therefor he swears allegiance to a second lord. Supposing these lords to go to war with one another, in which character will the vassal be said to have taken the earlier[1] oath, and thus to have bound himself by the principle of prior fief? And it might seem that we should say 'to the duke'—for the oath was first taken to him, and, being prior in time, he is prior in right also. But the reverse is the truth, as was pointed out by de Afflictis,[d] who cites Jacobus de Ardizone;[e] and he might have quoted also a passage in the *Feudorum Libri*,[f] where there is a very similar case: A man held two fiefs from different lords, and had safeguarded the right of the prior lord. His two sons divided the estate,[2] and each of them took over his fief from the lord in question as a liege vassal, i.e. agreeing to support that lord against all comers. On the death of one brother, and the reversal of his fief to the survivor, that fief will revert to the status in which both fiefs were in the father's day, with no regard for the sons' later [32] oath of allegiance.

[d] *On Feuds*, Bk. II, tit. XXVIII, § 4, n. 47.
[e] *On Feuds*, Bk. I, tit. VIII, § *convenit etiam*; and text of chap. *extraord.* cxlix, § 21.
[f] II. LII. ii.

Again there is exception,[3] if only one of two fiefs is a liege fief, i.e. as I have explained, a fief whose holder makes reservation in favour of no
4 one. So Baldus.[g] (But a vassal who already acknowledges a previous lord should not accept a fief from another on such terms; for he may not infringe upon the right of the prior lord.[h])

[g] *On Feuds*, proem., no. 52.
[h] So Baldus *ibid.*, and on II. xxviii. § 4.

5 But when each of two fiefs is so ancient that it is not known which

[1] [For *prios* read *prius*.—TR.] [2] [The reading *castra* represents *beneficia* of the original.—TR.]
[3] [See other exceptions in nos. 1 and 2.—TR.]

is the prior lord, the vassal will serve the greater; and in case their standing is equal, there will be room to show favour, according to de Afflictis.[a] But Baldus[b] rules that the vassal will serve the lord from whom he holds the more important fief; and this seems to me more reasonable than the rule of de Afflictis regarding the lord of higher rank. For since the vassal is assessed according to his holdings, the larger fief should outweigh the smaller.

[a] *On Feuds*, Bk. II, tit. XXVIII, § 4, no. 45.
[b] *On Dig.* I. v. 10, first lecture.

There is another similar question: When several sons directly succeed a lord, to which of these sons shall a vassal render service if they fall to fighting with one another? Baldus[c] says that the vassal will serve the elder, or the more worthy, or no one of them at all; for they are standing in one another's light. Thus also Alvarotto.[d] (But understand all this of things indivisible, e.g. person and counsel, as I have noted above. In regard to things divisible the case is different. So Baldus;[e] and see elsewhere[f] discussion of the whole subject at greater length.)

[c] *On Dig.* I. viii. 1, qu. 23.
[d] *On Feuds*, Bk. II, tit. XXVI, § 8, col. 7.
[e] *On Dig.* XIX. ii. 26.
[f] Durandus, *Speculum*, tit. *On Feuds*, § *Quoniam*, qu. 12, with many following.

Furthermore, there is exception in the case of a vassal of a vassal; 6
for such a one, according to a gloss,[g] is not bound to serve the overlord. As a reason why 'my vassal's vassal is not my vassal', while yet the heir of an heir is an heir of the principal, Baldus[h] points out that, in the case of an heir, this is due to the aggregate of rights which passes over to him, whereas in the case of a vassal there is no such transfer, says the law, unless by prearrangement and contract with the grantor, and because, 'he has not the first claim (*causa*) upon me, nor the second'. However, Baldus himself here dissents, and he is followed by Alvarotto,[i] who says that the overlord by withdrawal of fief will compel the vassal to render him service.

[g] The last on the final section of *Feuds*, I. XXIII.
[h] *Ibid.*
[i] *Ibid.*

(But with regard to my citation above, 'My vassal's vassal is not my 7
vassal', you must read and interpret this in the light of the difference between fiefs. For, as a gloss points out,[j] if I am your vassal and you are vassal to another, it does not follow that I too am vassal to the last named; but if on behalf of one and the same fief I recognize you as lord and you so recognize another, then I too am the latter's vassal—as in the case of subinvestiture. So Bartolus held on *Digest* XLIV. iii. 14, expressing himself more clearly on XX. iv. 16. And a passage in support of this view might be cited from the *Feudorum Libri*.[k])

[j] *On Dig.* XLIV. iii. 14.
[k] II. LV. i. § 6.

Moreover, Andrea d'Isernia[l] fully discusses this point, reaching the conclusion that in[1] certain particulars a subvassal is vassal to the overlord, while in[2] others he is not—even though the fief be one and the same. Consequently, according to him, the subvassal will swear 8
allegiance, not[3] to the overlord, but to the immediate lord; and [32′] the fief will be under the direction of the latter, and not of the overlord. He adds also that Robertus de Campis, who held a fief from the

[l] *Placita principum seu constitutiones regni Neapolitani*, on law 1, *de assecura. dom.*

[1] [For *quo ad quaedam* read *quoad quaedam*.—ED.]
[2] [For *quo ad quaedam* read *quoad quaedam*.—ED.]
[3] [Before *primo* insert *non*.—TR.]

church, ordered the vavasors under pledge of loyalty to him not to swear allegiance to the church. Baldus[a] says also that by letter of the law the subvassal is not vassal to the overlord; but that on the merits of the case he really is a vassal.

9 And again Baldus[b] declares that an overlord does not exact an oath of allegiance from the subjects of his own vassal, unless formally so provided in the investiture, or unless he has general jurisdiction in that territory. He cites Durandus,[c] and he is himself cited by Jacobinus de Sancto-Georgio,[d] without comment, as is the latter's usual custom.

This is to be noted with respect to the subjects of the vassals of dukes, marquises or other rulers who are overlords of a district. The principle was stated originally by Oldradus,[e] who says that the vassals of a baron who sets out under a general order to serve the king are counted as in the service of the higher power, and so are relieved of obligation to the baron. He adds also[f] that there is no ground on which a baron may compel his vassal to serve his lord and superior, i.e. the baron's own overlord.

10 How now in the case of several heirs who succeed the same vassal? Are all liable? If we assume that service consists in contribution, they are liable individually—and in proportion to the share of the fief falling to each. If, however, service consists in personal attendance, then some one will be liable in full (such being the nature of an indivisible obligation; and this individual will render service for all), or they will agree among themselves who shall serve.[g]

11 What has been said above bears upon another question: If a duke rebels against his king, should a vassal of the duke serve the duke or the king? This question is treated by Durandus,[h] who holds that the vassal will serve the king. But Jacobinus de Sancto-Georgio[i] takes the other view, making a distinction, however, according as the overlord has direct jurisdiction in the territory or not.

Such a case happened in our times. A certain noble vassal of a duke was in the service of the Emperor. The duke, in company with other leaders, made a conspiracy against the Emperor, and this noble vassal delivered over his state to the duke, thus rebelling against the Emperor. For so doing he was challenged to a duel by another noble, a comrade-in-arms, who charged him with being a traitor. On this issue he defended himself on the field of honour and was vindicated.

Yet it might be said with the Lombard law 'We have seen many fall under a just shield'.[1] For, as a matter of fact, the ordeal of the duel is no test of verity, but rather of rashness and chance. But, as for the [33] noble in question, he was afterward regarded even by the Emperor's party as a loyal and brave man, and important strongholds and forts were entrusted to him. With regard to these he acquitted himself honourably.

[1] [i.e. though their cause was just.—Tr.]

[a] *On Code* VI. xliii. 1, col. 1, words *quaero testator*.

[b] *De Pace Constantiae*, last sec., col. 1.

[c] *Speculum*, tit. *On Feuds*, § *Quoniam* (above cited), clauses 14 (*quaeritur*) and 15.

[d] *Investitura* (above cited), gloss, *qui quidem investiti praestiterunt iurandum*, no. 14.

[e] *Consilium* 234 (above cited).

[f] *Ibid.*, words *non videtur*.

[g] So Durandus, *ibid.* § *Quoniam*, (above cited), qu. 9.

[h] *Speculum*, tit. *On Feuds* (above cited), § *Quoniam*, clause 14 (*quaeritur*).

[i] *Investitura* (above cited), gloss, *et promiserunt praestare debita servitia*, qu. 10.

But on this question Martinus Laudensis[a] took the contrary view, declaring that the summons of his lord does not excuse a vassal, because it is the latter's duty to serve the higher power. This position he supports at length, and I think this view the sounder in regard to cases where the fief is owed through another to the overlord.

[a] *De Bello*, qu. 41, beginning *Si baro.*

Durandus[b] raises also another question: If a baron is engaged in a 12
war of his own, and the king in another, to which of the two should an immediate vassal of the baron render service? Durandus judges that service is due to the king, on the ground that there is public utility in the defence of the kingdom, and that private interests must give way. But if the King's war also is of a limited character (e.g. against another baron who had taken up arms against him), the right of the immediate lord will prevail, and to him service will be rendered. Such is the distinction made by Jacobinus de Sancto-Georgio,[c] who considers this subject at length.

[b] *Ibid.*, § *Quoniam* (above cited), qu. 15.

[c] *Investitura* and gloss (above cited), no. 12.

## CHAPTER IV

### WHETHER A VASSAL IS BOUND TO FOLLOW HIS LORD TO A FOREIGN WAR

### SYNOPSIS[1]

1 A vassal follows his lord to war outside the district.
2 Whether a vassal follows his lord in war to a remote district as well as to one near by.
3 Whether a vassal follows his lord outside the district both for aggressive purposes and for defence or for recovery of losses.

WHETHER a vassal is under obligation to accompany his lord out- 1
side the district is a question raised by Baldus.[d] He concludes that the vassal is bound so to do, and adds that if the King of France should invade Ireland with hostile intent, a vassal who refused to follow would lose his fief.

[d] *On Feuds* I. v. at the beginning, no. 4.

De Afflictis,[e] however, restricts this to cases where it is a question 2
of avenging an injury done the king. In my judgement it would have been simpler and better to have said that the rule holds in the case of a war of necessity and not of arbitrary choice. He cites d'Isernia;[f] and see also Jacobinus de Sancto-Georgio,[g] with my remarks above.

[e] *Ibid.*, cols. 3 and 4.

[f] *On Feuds* II. li., § 7, and II. xxiv, § 6.

[g] Gloss (above cited) *et promiserunt* [*praestare debita servitia*], no. 3.

[33′] There is further restriction also: if the district to which the 3
vassal is taken is near at hand; and if it is a question of reclaiming it, and not of acquiring it. For this see d'Isernia, Alvarotto, and others[h].

[h] *On Feuds* I. v, 1.

But even though the war is waged in remote localities, the vassal

[1] [This synopsis does not articulate perfectly with the text.—TR.]

will still be obliged to follow the lord if the latter has been in the habit of proceeding to other like places; for this is tacitly assumed to have been the arrangement from the beginning. An illustration is found in the case of the King of France; but to-day a better example is afforded by the Emperor and the King of Spain, who is accustomed to undertake expeditions into all parts of Europe and even into Africa, and to take himself and his armies thither. The original statement is found in Durandus.[a]

[a] *Speculum*, tit. *On Feuds*, § *Quoniam super homagiis*, clause 23.

## CHAPTER V

### WHETHER IT IS PERMISSIBLE FOR A VASSAL TO DESERT HIS LORD IN BATTLE

### SYNOPSIS

1 A vassal should not desert his lord in battle.
2 Exception: if he sees him dead or mortally wounded.
3 What if his presence will be of no benefit to the lord?
4 A vassal may withdraw if seriously wounded.
5 What if his desertion worked no ill to the lord?
6 What if the lord dies of neglect, though his wounds were not mortal? Should the desertion of the vassal be excused?
7 And what if he fled through fear, without ascertaining that the lord's wounds were mortal?
8 Whether a vassal may desert his lord in an unjust battle or war.
9 The difference between deserting in war and in battle.
10 An untimely dissolution of association is not permissible.
11 A vassal who cannot help his lord is justified in looking out for his own safety.

1 A VASSAL is bound to follow his lord even to such a degree that he may not desert him in battle and look out for his own safety by retreat-
2 ing, unless he sees the lord dead or mortally wounded.[b] Even so there
3 is restriction: in case it was in his power to aid or rescue the lord.[c] (The expression 'it was in his power' Baldus[d] says is worthy of special note. And, he adds, a deterrent must be of serious character and the result of no fault; for otherwise the vassal will not be excused.) There is [34[1]] a similar ruling also in *Digest*, XLIX. xvi. 3, § 22 and vi, § 9.

[b] *Feuds*, Bk. I, tit. v, cap. i, at the beginning.
[c] *Ibid.*, XXI. ii, at end.
[d] *Ibid.*

4 Again, it is stated in a gloss[e] that if a vassal has withdrawn from the fight suffering from grave injuries, e.g. being worn out with wounds or having maimed arms, he is excused. But suppose that the lord, too, is at the point of death, being desperately wounded, and after the withdrawal of the vassal he succumbs to these wounds? Baldus[f] argues this question, at length concluding that the vassal is excused. (But this discussion is superfluous in view of the above-made citation;[g] for there

[e] On chap. i, above cited.
[f] *Ibid.*
[g] *Ibid.*

[1] [For p. 33 read p. 34.—ED.]

it was counted as all one whether the vassal leaves the lord dead or at the point of death.)

For the crime of desertion a vassal is punished with such rigour 5 that even if his withdrawal in no wise injured the lord, he none the less forfeits his fief. And the reason for the rule is obvious; for since desertion is a crime deserving of punishment, recourse to it establishes[1] guilt, and nothing more needs to be said. For, in the case of a soldier, on other grounds too, it is a serious crime to desert the battle-line, and at times the punishment is death.[a]

[a] *Dig.* XLIX. xvi. 6, § 3.

Accordingly there is doubt regarding the statement of Baldus[b] to 6 the effect that if the lord dies as a result of poor treatment or the neglect or ignorance of the surgeon, the vassal who deserted is not punished in full, but in proportion. For I think it more logical that he be held responsible in full, inasmuch as he defaulted in full.

[b] *On Feuds*, I. v, chap. i, qu. 6.

Possibly the punishment might be lightened in cases where the 7 lord was really mortally wounded, and the vassal withdrew without ascertaining this. For he would be excused on the principle that fact takes precedence over mistaken impression; so Jacobinus de Sancto-Georgio.[c] Yet in strict justice the reverse might be said, because, so far as the intent of the vassal is concerned, his flight was motivated solely by fear and lack of zeal, which in a soldier are crimes.[d] And it is not a question of the lord's welfare, but of the intent in the vassal's mind—just as was said in cases where the desertion worked no injury to the lord. So Baldus.[e] (And almost all these questions are considered by Curtius,[f] who in regard to many of them reaches a different conclusion than I shall here set down. It will be for the reader to determine what to accept.)

[c] *Investitura* (above cited) gloss: *et promiserunt praestare debita servitia*, no. 21.

[d] *Dig.* XLIX. xvi. 6, at the beginning.

[e] On above cited qu. 6 [qu. 4].

[f] *Tractatus Feudorum*, Fourth main div., qu. 1 to qu. 13.

Again Jacobinus[g] says that when a war is unjust and the fact is well 8 established, a vassal may without guilt desert his lord. But I regard such action as tantamount to betrayal if taken not through fear, but in cold blood.

[g] Above cited gloss, *et promiserunt*, etc.

And the glossator and the Doctors cited[h] by Jacobinus are not 9 speaking of a vassal who has deserted in battle, but in war—cases that are far different. For the laws do not say that a vassal who deserts his lord in war should lose his fief, but rather if he deserts in battle, that is, in the heat of the strife and conflict. For, in the case of a war, other assistance can be secured, and the desertion may affect the lord little or not at all; but in battle the situation admits of no delay, since there it is a question of [34′] 'touch and go'.[2] (If it be properly introduced here, there is support for this view in a passage in *Digest* XLIX. xvi. 5, § 1.) And though it is permissible not to become involved in the quarrels of others, especially when a person is not so obligated, still, after undertaking to help, it is not right to default.[i] In fact, even in a war I think

[h] *On Feuds* I. v. i.

[i] *Dig.* III. v. 20, § 2.

[1] [For *consumatum* read *consummatum*.—Tr.]

[2] [For *permodo* read *per modo*.—Tr.]

weight should be given to the criterion suggested by Baldus,[a] namely whether desertion would affect the lord's interests or not (e.g. if, trusting to this support, he has provided for no other).

[a] On chap. i, above cited.

And if in the case of a partner an unseasonable dissolution and sun-
10 dering of partnership is not allowable,[b] how much less so in the case of a vassal? (There is point, too, in what I shall say below on the subject of the deserter.[c]) And I do not think that the vassal will be excused on account of the injustice of his lord's cause, particularly if he were in a position to know of this from the start—for, possibly, he might be in some degree excused, if injustice became manifest in the light of subsequent developments (see *Code*, III. i. 14, § 4). But understand this with a reservation in favour of what has been said above under a previous head, lest we fall into conflict in view of what is there stated.

[b] *Dig.* XVII. ii. 14.

[c] Pt. VIII, chap. i, no. 27.

But in cases where a vassal can in no way secure the safety of the
11 lord by remaining, it is right for him to think of his own safety and to look out for himself. For flight is not always a disgrace, according to the remark of Demosthenes:[d] 'He who fights and runs away will live to fight another day'. For although the man who begins a retreat is punished by death, according to *Digest*, XLIX. xvi. 5, § 1, still the situation is far different in the case of a man who looks out for his own safety only after all is lost.

[d] [See Gellius, XVII. xxi. 31].

## CHAPTER VI

### AT WHOSE EXPENSE VASSALS SERVE THEIR LORD IN WAR

### SYNOPSIS

1 Whether a vassal should aid his lord at his own expense. See also the following chapter, no. 10, § *Quod vero*.
2 Vassals must at their own expense accompany the Emperor to coronation.
3 If not, they should send a proper representative;
4 Otherwise they must surrender half the revenue of the fief for a year.
5 The representative must be equally acceptable.

1 Jacobinus[e] raises also the question at whose expense a vassal should follow his lord—at his own, or at another's.[f] And his opinion is that in case there is an agreement covering this point, it should be observed. Otherwise: (1) the fief [35] is able to bear the expense, or the war is within the territory, and then the vassal will serve at his own expense; or (2) the fief is poor, or there is need to journey outside the territory, and then it will be at the lord's expense. This was the view of Alvarotto also.[g]

[e] Above cited gloss: *et promiserunt praestare debita servilia.*

[f] *Ibid.*, qu. 2.

[g] *On Feuds* II. VII. i, col. 7.

2 But when the Emperor goes to Rome to take the crown and the

barons accompany him, then it is specifically required that they come in person, or send a representative acceptable to the sovereign, or surrender one-half a year's income from the fief;[a] and it will be left to the baron's option which of the above-mentioned services he shall elect to perform.[b] And, speaking of a representative acceptable to the lord, the standard should be the judgement of an honourable man, as Baldus there declares.[c] The representative, therefore, must be equal in intelligence and in retainers to the person sending him, as we gather also from the remarks of Jacobinus.[d]

The last named writer enumerates[e] sixteen cases in which a vassal escapes blame, even though he does not pay the service due to his lord. These may be found in the citation given.

[a] See *Feuds*, II. xl, § 2; and II. lv, § 3.
[b] *Feuds*, II. lv, § 3.
[c] *Ibid.*
[d] Gloss, above cited: *et promiserunt*, &c., qu. 22, 23, and 24.
[e] *Ibid.*, qu. 24.

## CHAPTER VII

### WHETHER A LORD MAY IMPOSE A WAR-TAX ON HIS SUBJECTS

### SYNOPSIS

1 When subjects may have a war-tax levied upon them.
2 His own income and imposts should suffice a lord.
3 A lord is justified in taxing subjects under stress of urgent necessity.
4 A lord taxes the subjects of his vassals under stress of urgent necessity.
5 Exception; if they are taxed in addition by their immediate lords.
6 Subjects will serve their lords with person and substance in case of need.
7 Rulers should not make war with loss to their subjects.
8 A ruler should exhaust his own treasury before touching the purse of his subjects.
9 A ruler should tax all justly and in due proportion.
10 When delay is perilous, money is seized where most available. But later there should be fair readjustment.
11 In case of conflicting claims, to which of many confederates is an ally most bound to give his help?
12 Aggression not the same as defence.
13 It is more righteous[1] to help in defence than in aggression.
14 A ruler should not spare his own treasury by taxing his people.
15 A ruler who squanders his money may not lawfully make forced collection from his subjects, even when there is dire need.
16 Contribution to the extent of need; but not a whit farther.
[35′] 17 Discretion of the soldiers.
18 A ruler may not impoverish the subjects of others to meet his own need, even though he is strong enough to enforce the demand.

THE question may also be raised whether a ruler, to meet the 1
expenses of war, may burden subjects and peoples with special[2] taxes
and other unusual exactions. As for vassals, the answer has already 2
been given above. And in the case of the rank and file, it is required
only that they support the lord with tribute and other customary

[1] [*Equius*, i.e. *Aequius*.—TR.]
[2] [For *super indictis* read *superindictis*.—TR.]

returns, without further exactions touching personal service or possessions.

3 However, such emergency might arise that the lord would be justified in imposing additional taxes also. So declared Panormitanus[a] 4 and Jacobinus,[b] the latter of whom adds that the lord may tax even the subjects of vassals, when there is very pressing need, appending, 5 however, the qualification:[c] unless such subjects are taxed in addition by their immediate lords. For in that case they should not be weighed down with a double[1] load. But this principle is little observed.

6 Baldus[d] also declares that, in the case of a just war, subjects are bound to aid the lord with person and property, but only in time of stress, and with the reservation that they may serve in the person of an equal substitute. For, says he, to serve in the army is a public and a necessary duty, when the cause is just—as much so as supplying the means of transportation and other things; in fact, if the lord needs the actual personal presence of the subject, he will be able to conscript him specifically and absolutely;[e] but if he does not need the subject in person, it suffices that a substitute be sent.

7 Guy de la Pape[f] says also that a ruler ought not to make war with 8 loss to his subjects, but that he should first pay out his own money; after so doing, however, he may draw upon the subjects for assistance. 9 He cites Cino,[g] who so states, adding that in such a case a ruler should 10 tax not merely one state or province, but rather all, unless there be need of such haste that delay would be dangerous. For under these circumstances it is permissible to take funds where they are most available, even from the treasure of the church—but with the understanding that there be later a *pro rata* adjustment of the tax, with repayment of funds collected. Thus Cino.

That [36[2]] subjects are bound to serve the lord in person and with goods was stated categorically and without qualification by Martinus Laudensis;[h] but he handles the subject in a very perfunctory fashion.

As for my statement above that a vassal serves his lord at the expense of the latter, understand that this does not apply in cases where by agreement or compact a person is under obligation to serve to the extent, let us say, of supplying a horseman or foot-soldier in war. For this surely[3] he will do at his own expense. So Baldus held.[i]

11 Again, a question already treated above (namely, to which of many lords a vassal should render service) has a bearing on the following problem: When many states or rulers have entered into friendship and alliance on such terms that they are bound to help one another in war, if hostilities are begun by two of them simultaneously and the allies cannot help both, to which shall they give the preference?

[a] *On Decretals* II. xxiv. 29.
[b] Gloss: *et promiserunt*, &c., qu. 18; and *De Homagiis*, no. 36, words *sed hic cadit alia dubitatio.*
[c] *Ibid.*, words *e ad id quod dixi.*
[d] *Consilia*, I. 483, qu. 3.
[e] *Ibid.*, doubt, 4.
[f] *Decisiones*, 113, at end.
[g] *On Code* I. ii. 11.
[h] *De Bello*, qu. 41.
[i] *Consilia*, V. 407 (*Super facto domini Cortonen.*), col. 1, toward end.

[1] [For *duplici* read *duplici*.—Ed.]
[2] [For p. 35 read p. 36.—Ed.]
[3] [For *in dubio* read *indubie*.—Tr.]

Angelus[a] says that in such a case there will be room to show favour, with due regard, however, for the nature of the terms of the compact. This too was the view of Albericus,[b] and he also finds an analogy in the case of the vassal of several lords. But Giovanni d'Andrea[c] declares that service will be rendered to the one who has the stronger claim. On this see also Romanus.[d]

In the case under his consideration I think that Romanus rendered the right decision; for the count in question had entered into agreement with the King of France earlier than with the King of England. But in the case of a compact between many states or rulers made at one time I do not see which could be said to have the stronger claim, unless perhaps it be the party on whom war was first declared or who first called for help. If, however, compacts were made at different times, the party prior in time has also priority in claim, as Romanus[e] says.

Moreover, in close relation with this subject, Baldus at another 12
point made the statement that to attack is one thing and to be attacked is another, assuming on this basis that exempt persons (who do not contribute even in the matter of war burdens) will nevertheless be subject to assessment, if a dangerous war arises. But this he says is to be understood to apply in case a ruler or state is attacked, and not in case of aggression (i.e. when a war is defensive and not offensive), on 13
the assumption that in offensive warfare some blame attaches to a state which began a war without appraisal of its own resources. (This principle could be applied to the preceding case, making it the better course for an ally to help a party attacked than a party attacking.) So Baldus.[f]

Therefore,[1] though the resources of subjects are a sort of insurance 14
and last resort for a ruler at war, he should beware[2] of spoiling and impoverishing the provincials, while sparing his own treasury. For in God he will find an avenger, Who, on examining the assets of the treasury, will arrive at the truth more readily and surely than the unfortunate subjects themselves could do.

Rulers should also beware of squandering their wealth. [36'] For 15
in such case they will not be blameless, if they have recourse to the funds of others—as the sage puts it: 'Those who consume their own, &c.' For emergency affords them no excuse, if emergency overtakes culpable carelessness.

Furthermore, rulers should have a care not to tax beyond bare 16
necessity; for if they need ten and take twenty, their action is inexcusable. And they should not allow their soldiers to burden the provincials, even when funds are lacking for the pay-roll—at any rate, they should not give the soldiers a free hand, as is always the case in living 'at discretion', as they falsely term it.

[a] *On Dig.* XXIX. v. 3, § 1.
[b] *Ibid.*, on § 4.
[c] In *Addit. to Durandus*, on tit. *De Treuga et Pace*, at very end.
[d] *Consilium* 47.
[e] *Ibid.*
[f] *Consilia*, IV. 458 (*Lata fuit sententia*); so also V. 406.

[1] [Cf. no. 7 ff., above.—Tr.]
[2] [For *caueant* read *caveat*.—Ed.]

[17] For it would be a case of 'discretion' if they behaved toward their unfortunate hosts as they would in their own homes, or even as they do when living at their own expense. But when they call for dainty fare and even money to boot, neither the soldiers nor the captains nor the commanders and kings themselves (who know of these practices and wink at them) are blameless in the sight of God; and He does not long allow 'the rod of the wicked to rest upon the lot of the righteous.'[a]

[a] [Cf. *Psalms*, CXXV. 3.]

18 And far less should lords or even kings be allowed to oppress outside peoples who are not even indirectly their subjects. For of such it is required only that they give the lord the benefit of their lands and resources, when matters have progressed to a point where he must claim such help—and this too without treating these provincials either as his own subjects or yet as slaves, misusing their substance and their persons to the point of rapine—as we have seen done everywhere in our home districts of Piedmont, Asti, and Montferrat, and throughout all Liguria—regions that have been pillaged by the rank and file (and, I am ashamed to say, by their captains and generals also) without any scruple or pity. This not even the Turks do, when they are at war.

[37]

## CHAPTER VIII

### ON DECLARING WAR

### SYNOPSIS

1 War should be declared only after long consideration.
2 War must be declared before beginning hostilities.
3 *Fetiales* and their code.
4 Spurius Postumius was surrendered to the Samnites.
5 Mancinus was surrendered to the Numidians.
6 To begin hostilities without warning is tantamount to treachery.
7 Whether a person surrendered to the enemy is still a citizen.
8 How long a time should intervene between proclamation and war.

After long preliminaries we have now come to the matter of
1 declaring war, with a hint, as it were, that a person who is contemplating and planning war should think long, and ponder well, and have extended experience in warfare. For this is a business well characterized by the familiar word of the poet:[b]

[b] [Virgil, *Aeneid* VI. 126 ff.]

> Easy the downward way;
> But again to turn, and reach the realms of light—
> Ah, this the labour and the toil!

Would that kings would ponder well their own anxieties, the losses and destruction of their subjects, and the doubtful issues of war! For

very often wars that seem easy at the start issue in results that are most troublesome. Hence the famous poet[a] with good reason says of Aeneas:

[a] [Virgil, *Aeneid* X. 159 ff.]

> Here great Aeneas sat; and in his heart he weighs
> The issues wide of war.

Surely, if they were wise, kings would make haste slowly in such matters.

As for me, with my poor wit, when I review this subject and note how readily, how lightly and—pardon the phrase—how rashly wars are often renewed in these unhappy days of ours, I am easily led to believe that, with concurrent visitation of divine judgement, the crimes of both people and rulers steal away the sense of the latter, so that, without a thought of peace for themselves or for others, they plunge into so wide and open a gulf, whence they can scarce escape to safety except through the aid of Heaven. But to return now to the subject of discussion.

When, therefore, it has been decided to enforce one's right by arms, hostilities must not be begun before a declaration of war. Thus, 2
Homer writes that, before undertaking that long-continued struggle, the Greeks sent the princes Menelaos and Ulysses to Troy to demand the restoration of Helen.

Such were the functions of the Roman *fetiales*, whose code was 3
called 'fetial'. According to this code, says Cicero,[b] there can be no just war unless preceded by a demand for restitution, or unless it has been previously proclaimed and declared.

[b] [*On Duties*, I. xi. 36.]

The procedure for demanding restitution and for declaring war is described by Livy,[c] who states that, during the reign of King Tullus, the latter sent envoys to Alba to demand restitution of captured property; also that there is no record of any older covenant.[1] And later he adds[d] that Ancus, the successor of Tullus, followed this same procedure; also that the ceremonial was borrowed from the ancient people called Aequicoli.

[c] I [xxii. 4.]

[d] [I. xxxii. 5.]

And lest we suppose that only the Romans employed the fetial code, Livy elsewhere indicates that the Samnites used the same,[e] recording that they not merely surrendered to the Romans property that had been carried off, but also delivered up a leader of their own nation, who had violated a truce.[2]

[e] I. viii [VIII. xxxix. 12 ff.]

And in their turn the Romans, too, through the *fetiales* [37′] surrendered to these same Samnites the person of Spurius Postumius, 4
who had authorized the notorious Caudine peace. It is my pleasure to quote Postumius' own words: 'Stripped and bound, let us be surrendered by the *fetiales*,' said he. 'Let us free our people from

[1] [i.e. than the one made by the *fetiales* for the settlement of this difficulty between Rome and Alba. See Livy, I. xxiv. 4.—Tr.]

[2] [*induciaru*, i.e. *indutiarum*.—Tr.]

obligation, if we have bound them by any, so that in the sight of gods and of men there be no bar to a just renewal[1] of the war.'[a]

[a] [IX. viii. 6.]

And it will not be out of place to record the formula of this surrender as made by the *fetiales*: 'Inasmuch as these men', said they, 'without authorization of the Roman people, Quirite citizens, have covenanted that a treaty will be made, and[2] in so doing have committed a wrong: therefore, in order to clear the Roman people of blame, I surrender to you the persons of these men.'[b] And again, in a later age, the Romans on like grounds surrendered Mancinus to the people of Numantia.[c]

[b] [IX. x. 9.]

[c] [Cicero, *On Duties*, III. 109.]

6 Consequently, Baldus declared[d] with reason that it is a sort of treachery to begin hostilities without declaration of war[e]—a statement already made at an earlier time by Giovanni d'Andrea.[f]

[d] *On Code* VI. vi. 4.

[e] So again *On Code* III. xxxiv. 2, no. 20; on the *Authentica*, following *Code*, I. iii. 2 (*Item nulla*); and *On Feuds*, Lib. I. v. i, near the beginning, no. 16.

[f] *On Sext*, V. iv. 1.

But what I have said of Postumius and Mancinus does not bear upon the matter of declaration of war. For these men entered into a peace pact on their own responsibility, unauthorized by the people. And so they were surrendered to the enemy, to be disposed of as the latter saw fit, lest otherwise the Roman people be charged with injustice on the ground that, while rejecting the pact, they still sheltered the sponsors of the same.

7 And out of this a question arises: inasmuch as the enemy refused to receive either of these men, did they retain their Roman citizenship? And my opinion is that they did not. For they suffered the extreme loss of civil rights, which includes the forfeit of citizenship and liberty;[g] and a state has ceased to hold as its own, or as its citizen, a man whom it has repudiated and expelled, even though the enemy have refused to receive him.[h]

[g] *Dig.* IV. v. 11.

[h] Cf. *Dig.* XLI. ii. 1, § 4.

Alciati,[i] however, took the opposite view, citing Cicero in the *Topics*;[j] and the question is variously argued by Brutus and Scaevola. However, Modestinus[k] held that if such persons are not received by their people when they return, they do not regain their citizenship. This is said also in *Digest*, L. vii. 18, at the end; and I am surprised that Alciati failed to note or disregarded this in the passage above cited.

[i] *Parerga*, III. xiii.

[j] [37].

[k] In *Dig.* XLIX. xv. 4.

8 We might ask also: What interval of time should elapse between declaring war and the actual beginning of hostilities? To confess the truth frankly, nowhere in the histories have I discovered or[3] noted that there is a fixed period. But simple[4] common sense declares that it is right that some lapse of time intervene, in which a person may prepare himself and get ready for defence. For scarcely would a man be excused from the charge of deceit and treachery, who declared war and almost simultaneously made an attack.

This view is supported [38] by a passage in *Digest*, XLIII. xxiv. 5, § 1:

[1] [*de caetero* is substituted for *de integro* of the original.—Tr.] [2] [For *neque* read *atque*.—Tr.]
[3] [For *ant* read *aut*.—Ed.] [4] [For *ipsam* read *ipsa*.—Tr.]

('nor so to crowd his adversary that he cannot appear on time to oppose'). Moreover, I think the occasion for war should be taken into account also. For a man who has given ground for declaring war against himself should hold himself ready, especially if the occasion is recent, serious, or inexcusable.

[a] *Decisiones*, 191, beginning *Eos qui de cetero.*

I find, again, that Guy de la Pape[a] records verbatim an imperial constitution on this subject, which should be examined without fail by those concerned with such matters, and on which he adds a commentary and interpretation. Among other things, it is stated therein that an interval of three days is required.

## CHAPTER IX

### WHETHER ANY PERSONS ARE PROTECTED AND IMMUNE FROM THE ILLS OF WAR

### SYNOPSIS

1 Women are not exempt from the rigours of war.
2 The same is true of boys.
3 Boys should not be made prisoners.
4 In warfare among Christians, priests and others of the clergy are secure from[1] the enemy.
5 Foreigners are immune from enslavement.
6 Merchants also are immune.
7 Farmers and their stock are secure from the enemy.
8 Privilege is lost through abuse.
9 The laws get no hearing amid the clash of arms.
10 Envoys of the enemy are immune in[2] war.
11 Envoys who are planning some hostile act are not immune.

Inasmuch as there are rules for warfare as well as for peace, we ask first: When once war is declared, may it be pressed indiscriminately against all persons, regardless of rank, sex, age, or calling?

[b] *On Reprisals*, qu. 4, under 3d main qu.

And for the carrying away of women into captivity, there is proof in *Code*, VIII. l. 1, which Bartolus[b] cites on this point. There is 1
further evidence also in *Code*, VIII. l. 7, 8, 13, 14, and 16, and in *Digest*. XLIX. xv. 6, 8, and 9. And even to-day this practice persists in our dealings with enemies between whom and [38'] ourselves the ancient laws are still in force—e.g. the Turks and the Moors.

[c] See *Dig.* XXVIII. vi. 28; and XLIX. xv. 10 (at the beginning) and 11.
[d] [Livy V. xxvii.]

Nor are boys immune.[c] Though Camillus set a rare and praise- 2
worthy example in sparing certain lads;[d] for when a school-master 3
had treacherously brought into his camp the highest-born children of the Faliscans, whom he was besieging, Camillus said: 'We have no man-made alliance with the Faliscans; but the bond which nature has created holds, and will hold; and there are rules of warfare as well as of peace. We do not bear arms against this tender age, which is

[1] [Supplying *ab*, in accordance with the construction used in nos. 5, 7, and 10 below, and in the chapter heading.—Ed.]
[2] [For *a à* read *à*.—Ed.]

spared even in the capture of cities, but against armed men.' So spoke Camillus. With how much greater justice and propriety, therefore, would innocent boys be spared in the wars which Christians wage with one another! I warn them, however, to keep clear of the grasping hands of the soldiery, in view of the extreme greediness of the latter, the greater part of whom care for nothing but money.

4 5 6 7 Moreover, the canon law commands the sparing of priests, hermits, monks, pilgrims, traders, and farmers, with their stock.[a] However, Panormitanus[b] here remarks that this rule is little observed—which in these days of ours is obvious enough. Therefore, there is point in his appended statement that these regulations have been nullified by contrary practice—but with a reservation, for which consult him.

[a] *Decretals*, I. xxxiv. 2.
[b] *On Decretals*, I. xxxiv. 2.

However, I should not think that they have been nullified so far as religious persons are concerned (i.e. priests, hermits, and the like), personal violence to these being forbidden under the heavy penalty of anathema; see *Decretum*, II. xvii. 4. 29, a law which certainly has not been annulled. Soldiers who fear God will restrain their hands, therefore, and leave unmolested the men set apart for the service of God. I warn also the commanders of soldiers, their judges, and the officers concerned with the administration of law in the army, that they compel the soldiers to refrain from this act of sacrilege.

(On the other hand, the clergy should beware of presuming upon 8 their privilege, and of taking part in the action of war; for a privilege is lost by the man who abuses it.[c] Otherwise they will justly fall into immediate personal peril. Nor may they count upon a choice of court, since in these rougher surroundings remanding is infrequent; for kings and commanders of armies in such cases fall back upon the well-known 9 saying of Marius that the sound and the rumour of war prevent the laws from being heard.[d])

[c] *Decretum*, I. lxxiv. 7; and *Dig.* XV. i. 48, with the common rules.

[d] [Val. Max., V. ii. 8; and cf. Cic., *For Milo*, 11: *Silent enim leges inter arma.*]

Moreover, I do not think that these regulations are obsolete in the case of bona fide pilgrims, according to *Decretum*, II. xxiv. 3. 23, on which the Archdeacon comments to the effect that such persons are under the protection of the church and within its jurisdiction, and that it is the business of the church to protect them from any injury. For this he cites *Decretum*, I. xxxvii. 2.

10 Again, envoys of the enemy are immune. According to a gloss[e] [39] this is assumed to have been a tacit agreement between commanders. But it is more likely that the practice is based on the law of nations,[f] which in early times was so scrupulously observed that when ambassadors from Tarquin came to Rome, after his expulsion, to recover his possessions, and they were plotting secretly with the young nobles to restore him to the throne, and the thing was detected, although they appeared to have deserved to be classed as enemies, yet, says Livy,[g] the law of nations was adhered to.

[e] *On Dig.* II. xiv. 5.

[f] *Decretum*, I. i. 9; and *Dig.* L. vii. 18.

[g] [II. iv. 7.]

On the basis of such precedent, however, I should not think that 11
envoys to-day would be immune, if they attempted such a thing; for
they ought not to overstep the bounds of their commission.[a] And for
such action the Romans suffered severely at the hands of the Senones,
a Gallic people. For when the latter had attacked Clusium, the Romans
sent ambassadors to urge them not to harass the people of that city,
who were their allies. The Senones, noticing that these ambassadors,
after executing their commission, were actively engaged in battle on
the side of the Clusinians and giving them aid, sent envoys to Rome to
demand the surrender of the persons of the ambassadors who had
violated the law of nations. Receiving no satisfaction, they left Clusium
and marched straightway upon Rome; and, after the battle at the Allia,
they took the city and wrecked it shamefully, as we read in Livy.[b]

And from him we learn also[c] that Tatius[1] (who ruled jointly with
King Romulus) was killed by the Laurentines for having allowed
envoys of theirs to be flogged, contrary to the law of nations.

[a] *Code*, IV. xxxv. 21.

[b] V [xxxv. 4 ff.].

[c] I [xiv. 1 ff.].

## CHAPTER X

### WHETHER IT IS PERMISSIBLE TO CARRY ON WAR AT ALL TIMES

### SYNOPSIS

1 Days on which one must refrain from warfare.
2 Canonical truce.
3 Truce by agreement.
4 Battle days.

Moreover, it is not permissible to wage war and to engage in
hostilities at all times. For *Decretals*, I. xxxiv. 1, excludes certain days, 1
namely Thursday, Friday, Saturday, and Sunday. An explanation of
this is there given by Panormitanus,[d] which originated with the Arch-
deacon,[e] although he is not cited. To these I refer.

War is likewise forbidden on all the days between the advent of our
Lord and the octave of Epiphany, and from Septuagesima to the octave
of Easter. And this is called the canonical or legal truce, to distinguish 2
it [39′] from truces made by agreement between leaders. (But we need 3
give little heed to the canonical truce; for the glossators and doctors
agree that the above law is obsolete.) But though *Decretum*, II. xxiii.
8. 15, indicates that fighting is allowable at any time, we must under-
stand with the reservation: 'if necessity compels'.[f]

It is no new thing, nor yet an innovation of canon law, that
there should be certain days and times for abstaining from war. For
we read also in Festus that among the ancients the term 'battle days' 4

[d] *On Decretals* I. xxxiv. 2.

[e] *On Decretum* II. xxiv. 3. 25.

[f] See 1 *Maccabees*, ii. 41; and (by implication) *Decretum*, II. xxiii. 8. 15, according with *Decretals*, V. xl [4].

[1] [For *Taticum* read *Tatium*.—Ed.]

was used of days on which, without any pre-arranged truce or armistice, there must be no fighting—just as upon the occasion of public festivals they abstained from battle.[1]

But in our times, which have little regard for things sacred or profane, no days are exempt from fighting. For even on the holy day of Easter the forces of Pope Julius[2] II and Ferdinand, King of Spain, engaged in a fierce contest with the French at Ravenna; and again at the very sacred time of Easter a terrible battle was fought between the Spaniards and French near Ceresole, which is a village of Cuneo Province.

## CHAPTER XI

### AGAINST WHOM A PROCLAMATION AND DECLARATION OF WAR IS DIRECTED, AND WHO ARE INCLUDED UNDER IT

### SYNOPSIS

1 War need not be declared against pirates.
2 Pirates may be attacked without question by any one.
3 War may be waged against all subordinates of a belligerent, if they aid him in person or with goods.
4 War is not pressed against a person who is an enemy by birth but not by residence.
5 Even though all subjects are counted as enemies, people who merely live in territory seized by an invader do not belong to that category.

I HAVE already stated that hostilities should not be begun except after a proclamation or declaration of war, as it is called. But it is
1 customary to make exception in the case of pirates, since they are both
2 technically and in fact already at war; for people whose hand is against every man should expect a like return from all men, and it should be permissible for any one to attack them. So Baldus.[a]

Furthermore, any one may attack persons whom the Pope or the Emperor has branded as public enemies; for such are wholly outside the pale of the laws. So say the canonists[b] and Angelus,[c] [40] the latter adding that even persons in private life may assault such outlaws—and to the point of killing them.

3 Next the question arises whether it is permissible, after war is declared, to press it against all dependants, vassals, and allies of a belligerent. Antonius de Butrio[d] answers in the affirmative. So Baldus,[e] and Alexander,[f] and Angelus de Clavasio[g]—though the last named

[a] On the *Authentica*, following *Code*, VI. ii. 18 (*Navigia*).
[b] *On Sext*, V. iv. 1.
[c] *Consilium* 14.
[d] *On Decretals* II. xiii. 12, col. 5, words *sed est dubium*.
[e] *On Code* III. xxxiv. 2, last col. but one, words *et not. quod quando aliquis*.
[f] In addit. to Bartolus *On Dig.* XLIX. xv. 28.
[g] *Summa*, word *bellum*, § 13.

[1] [There is manifest confusion here. Festus (p. 226 M.) reads as follows: 'Those are called "battle days" on which it is right to take the offensive against the enemy. For there were certain public festivals during which it was unlawful to do this.'—TR.]
[2] [*Iullij*, i.e. *Iulii*.—ED.]

restricts this ruling to subordinates who aid the lord in person or with goods; and this accords also with the view of the Archbishop of Florence.[a]

But I do not see how the restriction can hold. For, according to what has been said above, all subjects, if not in overt act, at any rate in status and potentiality are at the beck of the lord, if he needs them 4 —unless we except former subjects who have transferred their residence and their fortunes to another locality. These perhaps will not be subjected to warlike and hostile treatment; just as, in a similar case, Bartolus says that reprisals will not be made upon such people. See, too, what I shall say below.[b]

Moreover, in this connexion one point must by all means[1] be 5 stressed, namely that though it is permissible to despoil and take captive the subjects of the enemy—if, however, the enemy capture some territory of ours and by force hold it as their own, it will not be permitted our soldiers for that reason to press the war against the inhabitants of those communities, or to treat their persons and property as belonging to the enemy. For they cannot be called combatants, unless in a passive sense; nor are they guilty of fault or treachery, if they but keep out of the war and attend to their own affairs. So Baldus.[c]

For although these localities may help the invader in the conduct of the war, still it is taken for granted that the original intimidation and force are yet operative; see *Digest*, L. xvi. 48,[d] and the remarks of Bartolus[e] on the basis of this law. Panormitanus[f] adds that in the case of a person who has not been restored to original freedom, it is always presumed that the same intimidation remains. And with truth we might say of them what Baldus says,[g] according with Azo: 'Eliminate the power of choice, and every act will lack character.'

But the licence and rapacity of the soldiers have been little affected by this rule in our home district of Piedmont, where the French occupied many towns and villages of the duke; and yet these were no less exposed to the plundering and rapacity of the Emperor's soldiers than if they had belonged to the original French domain. But I think this was justified.

[a] *Summa*, Pt. III, tit. IV, § 1 (near end) and § 3, last col. but one.

[b] Pt. X, Chap. ii, entire first section, and at end.

[c] *Consilia*, III. 96 (*Proponitur quod consuetudo civitatis Hastensis*), at the end.

[d] At end.

[e] *On Dig.* IV. ii. 22.

[f] *On Decretals* I. xxxviii.[2] 10.

[g] *Consilia*, above cited.

[1] [For *omniuo* read *omnino*.—Tr.] [For *procnr.* read *procur.*—Ed.]

[40]

# CHAPTER XII

## WHETHER THINGS CAPTURED BECOME THE PROPERTY OF THE CAPTORS

## SYNOPSIS

1 Things captured in war become the property of the captors.
2 Lands of the enemy become the property of the captors, i.e. of the ruler of the captors.
3 Agrarian laws.
4 Enslavement may be permissible apart from war.
5 The Indians subdued by the Spanish became lawfully the slaves of the captors.
6 People captured by pirates do not lose liberty.
7 Slaves (*servi*) named from being 'spared' (*servare*).
8 Captives should not be killed.

1 THAT things captured in war belong to the captors is maintained
2 by the laws,[a] and that too not only things movable or self-moving, but
3 also immovables.[b] Hence arose those agrarian laws, which for a long time were a cause of dissension among the Romans.

4 And not only in war does enslavement take place, but also apart from it. For if a person should go among a people with whom his countrymen had no ties of hospitality or friendship, or if any one from such a place should come amongst us, he would be the slave of the person seizing him.[c]

5 With good right, therefore, the Spaniards enslaved those Indians of the West, who live far away from our world, and were unknown to the Greeks and Romans, but who were discovered in our times through perilous and bold navigation (under Spanish auspices and the patronage of the rulers Ferdinand and Isabella, and later of Charles V, Emperor and King of this name, but through the agency and toil of a man of Italy, Christopher Columbus of Genoa) with good right, I say, the Spaniards enslaved those Indians, as allowed by the law just cited;[d] unless one were to assume that this law refers to a foreigner captured as he goes among strangers, and not to foreigners captured in a strange land. (On this principle, perhaps, the aforementioned rulers, actuated by the Christian spirit, which they cultivate to a high degree, gave orders that if those peoples accepted the religion of Christ, they should live in freedom under their own laws.)

6 But persons captured by pirates or brigands will not become slaves of the captors, nor will they lose liberty or citizenship.[e] The difference between brigands and enemies is found set forth in *Digest*, XLIX. xv. 24, and L. xvi. 118.

7 Beyond a doubt slaves are so called from being 'spared' (*servari*). For nature herself admonishes us [41] that it is humane to spare a

[a] *Decretum*, I. i. 9; *Dig.* I. i. 5; *Inst.* II. i, § 17; *Dig.* XLI. i. 5, at end.
[b] *Dig.* XLIX. xv. 20, § 1.
[c] So the text of *Dig.* XLIX. xv. 5, § 1.
[d] *Ibid.*
[e] *Dig.* XLIX. xv. 19, § 2.

captured enemy and not to kill him.[a] For it is not right to treat a 8
prisoner with cruelty or to put him to death; and it is far more merciful to refuse to receive surrender and to press the fight to a finish.

And so also we read in Cornelius Tacitus:[b] when the Romans were attacking Uspe,[1] a city of the Siraci,[2] and the townspeople offered ten thousand slaves in surrender, the victors, says he, rejected the offer, because it would be cruel to butcher surrendered men, and difficult to guard so large a number,[3] and it was better, therefore, that they perish under regular fighting conditions. For it is savage and barbarous to do violence to prisoners.

However, we read that this too has happened at times. For, according to Livy,[c] the people of Tarquinii made sacrificial victims of three hundred and seven captured Romans. But their act did not go unpunished; for after conquering them, the Romans beat with rods and beheaded three hundred and forty-eight of the captives selected from a larger number.

The same thing happened to the people of Cluvia;[4] for, being unable to take by storm a Roman post in the Samnite country, they reduced it to surrender by starvation, and flogged and put the garrison to death. But the Romans in turn, capturing their city, put to the sword all the adults to a man.[d]

Moreover, in the peerless poet we read of the funeral of Pallas conducted in what was then the conventional way:[e]

> Behind their backs he tied the hands of those doomed to be sent
> An offering to the dead, to feed[5] the flames with victims' blood[6].

And in our wars at times we have seen captives slaughtered—a practice most abominable unless the captives be deserters, a topic on which I shall have more to say below in its place.

[a] *Dig.* I. v. 4; *Inst.* I. iii, § 3.

[b] [*Annals*, XII. xvii.]

[c] VII [xv. 10] and VII [xix. 2 ff.]

[d] [Livy, IX. xxxi. 1 ff.]

[e] [Virgil, *Aeneid* XI, 81 ff.]

## CHAPTER XIII

### THE DIFFERENCE BETWEEN ALLIES, SURRENDERED MEN, AND CAPTIVES

### SYNOPSIS

1 Who are called allies.
2 Surrendered men.
3 The formula of surrender.
4 Captives so called from 'capture' (*capere*).

Now that mention has been made of allies, surrendered men and captives, it is worth while to consider how these differ.

[1] [For *vispen* read *Uspen.*—Ed.]
[2] [For *Soracorum* read *Siracorum.*—Ed.]
[3] [*moltitudinem*, i.e. *multitudinem.*—Ed.]
[4] [Incorrectly reported by Belli. The incident concerns the Samnites.—Tr.]
[5] [For *sparsuras* read *sparsurus.*—Tr.]
[6] [i.e. the fire of the funeral pyre was to be sprinkled with the blood of prisoners slain for the occasion.—Tr.]

1 Allies are those who are bound to us by a friendly compact, and yet are themselves independent—whether they have entered the compact on even terms, [41′] or whether it has been agreed that one party by courtesy recognize the authority of the other.[a]

[a] See *Dig.* XLIX. xv. 7, § 1.

2 Surrendered men, on the other hand, according to Roman law were in a sort of middle status, not being wholly free, nor yet really captives or slaves—as the very formula of surrender itself declares. This latter is reported by Livy,[b] according to whom King Tarquin 3 questioned the Collatini in these words: 'Have you been sent[1] as envoys and spokesmen by the Collatine people to surrender yourselves and the Collatine people?' 'Yea,' answered[2] they. 'Is the Collatine people independent?'[3] 'It is,' replied they. 'Do you surrender yourselves, the Collatine people, the city, the fields, the water, the boundaries, the shrines, equipment, and all things pertaining to gods and men, into my power[4] and that of the Roman people?' 'We do,' said they. 'And I receive them.' So Livy.

[b] I [xxxviii].

However, that surrendered men more nearly approximate the status of captives than of allies may be gathered from the simple fact that at times they too were sold like slaves—as could be shown by many passages. Thus, according to Livy,[c] when, after the capture of Fidenae, the populace had surrendered to the Dictator Mamercus, on the following day individual captives were drawn by lot from horseman to centurion,[5] the number bestowed being determined by the valour of the warrior in question, and the rest were sold at auction.

[c] IV [xxxiv. 3 ff.].

But more consideration is shown in the case of those who surrender voluntarily than to those subdued by warlike power and valour, though both classes pass into the power of the enemy, as is shown also by the well-known passage in Livy.[d] For when the Campanians were begging aid of the Romans against the Samnites, and the Romans excused themselves on the ground that they could not rightly defend them against the Samnites, who also were their friends, the envoys said: 'Since you are unwilling to undertake our defence against violence and injury, at any rate you will defend what is your own. Therefore, we surrender the Campanian people, the city of Capua, the fields, the shrines of the gods, and all that concerns gods[6] and men, into your power and that of the Roman people, suffering whatever we shall thereafter suffer as people surrendered to you.' So Livy.

[d] VII [xxx. ff.].

And another passage of his indicates the same thing. For when Marcus Valerius Corvus had taken Satricum, he sold four thousand surrendered people. And Livy adds: 'There are some who say that this group of captives consisted of slaves; and this is more likely[7]

[1] [After *oratorésque* insert *missi*.—Tr.] [2] [For *inquit* read *inquiunt*.—Tr.]
[3] [For *libertate* read *potestate*.—Tr.] [4] [For *deditionem* read *dicionem*.—Tr.]
[5] [The text of Livy has been emended to read *ab equite ac centurionibus*, i.e. 'by the cavalry and the centurions'.—Tr.] [6] [After *Deum* insert *divina*.—Tr.] [7] [*verissimile*, i.e. *verisimile*.—Ed.]

than that persons who surrendered were sold.[a] Harsher measures, therefore, were used with surrendered people according to case and circumstance.

[a] See his account, VII [xxvii. 7 ff.]

Any one wishing further information on this head should consult Alciati,[b] and a note by Baldus on the title of *Code*, VII. v, where he also makes the noteworthy statement that if to-day some state were to give itself over to another after the fashion of ancient surrender, the victor might do with it as he wished, but he ought to spare life. This should be observed with reference to those who now at the present time surrender at discretion—a subject that I shall treat more fully later.

[b] *Parerga*, I. xiv, xv, and xvi.

That captives derive their name from 'capture' (*capere*), the word itself declares; and so Baldus[c] stated. Moreover, that they become slaves is shown by the laws cited at the beginning of the last chapter. 4

[c] *On Code* VIII. xlvii. 4.

[42]

## CHAPTER XIV

### THAT FAITH MUST BE KEPT WITH AN ENEMY

### SYNOPSIS

1 Faith must be kept with the enemy.
2 Faith need not be kept with brigands.
3 Deceptions that involve no treachery are allowable.

The law of nations requires that pledges be not violated, and that agreements made even with the enemy be carried out; so *Decretum*, II. xxiii. 1. 3, which is discussed by St. Thomas.[d] And Cicero[e] also states this to be the law of war, declaring that a pledge and oath given to the enemy must be kept. 1

[d] II. ii, qu. 40.
[e] [*On Duties*, III. 107.]

(But, says he, if you do not pay money promised for ransom to brigands, no wrong is done, even though you default after taking an oath; for a pirate is outside the category of legitimate combatants and the common enemy of every one—as I too have already pointed out above.) 2

Consequently, everywhere in history the Carthaginians are charged with perfidy; whereas Fabricius is lauded for justice and honour, because he scorned having poison given a dangerous enemy. And the Emperor Ladislaus is criticized, because, after making peace with Amurath the Turk, he violated it, under the delusion that he was not bound[1] to keep a pledge not sanctioned by the Pope. This, however, proved his undoing; for he was beaten in battle and lost his life.

But deceptions which involve no treachery may rightly and properly be employed. They are called 'stratagems', and here applies 3

[1] [For *teneretut* read *teneretur*.—Ed.]

the saying of Leonidas[1] that when the lion's skin was of no use, he put on the fox skin. So the well-known word of Virgil:[a]

Prowess or wile, who would ask in a foe?

[a] [*Aeneid* II. 390.]

There is a passage on this topic in *Decretum*, II, xxiii. 2. 2; and the histories abound in these stratagems. Moreover, the men who had the discernment to use them at the proper time are highly commended and praised. To record them, however, would not further at all our present purpose.

With wit and arms, then, war should be waged against the enemy—and with wiles too, if they involve no wrong or treachery (for in these there is no room for valour and glory). But no one should employ poison against an enemy, be he ever so aggressive and dangerous, even though a deserter or traitor offers such help—a decision that was approved in the case of Fabricius, as I have already said. How much less, therefore, should such assistance be solicited or bought! Yet, there are to-day people who regard this road to victory as the shortest and most convenient.

[42']

## CHAPTER XV

### WHETHER THE COMMANDER HIMSELF MAY ENGAGE IN SINGLE COMBAT

### SYNOPSIS

1 Romulus fought in single combat with Tatius, King of the Sabines.
2 Alexander fought in single combat.
3 Whether it is permissible for a commander to engage in single combat.
4 Dominion must not be staked on single combat.
5 Charles of Anjou made an agreement to fight with Peter of Aragon to determine to which of the two the kingdom of Naples should fall.
6 Default that disqualifies; at the start, or at the finish?

The question is raised whether it is permissible for a general, a prince, or even for the king himself to engage in single combat with the opposing king, or to covenant that[2] dominion shall pass to the victor.

1 Some authorities approve the practice, citing the fight of Romulus
2 with Tatius, King of the Sabines. Such, too, was the fight of Alexander of Macedon with Porus, King of India. And the chief of poets writes that Aeneas and Turnus fought thus for Lavinia.

[1] [The remark is ascribed to Lysander by Plutarch, *Apophthegmata Laconica, Lysander*, iii.—Tr.]
[2] [For *aut* read *ut*.—Tr.]

Oldradus[a] discusses the matter, saying that this practice is a grave 3
wrong, because it entices to sin and to strife, and because God is tried, in that the issue is risked on a chance—a thing which ought not to be. The same question is taken up by Paris de Puteo,[b] who seems to be wavering and self-contradictory. For in chapters ii and iv he decides that the practice is not allowable, whereas in chapter iii he says that a king may challenge the Emperor. (What point is there in a challenge, if fighting is prohibited?)

My own view is that it is altogether improper, either for kings, or 4
even for the Emperor; and this I hold both on the basis of the argument of Oldradus, and in view of the fact that there are definite methods established by law and custom for conferring dominion (for example, by election, as in the case of the King of the Romans; or by succession, as in the case of other kings), methods which the sovereign himself has no power to set aside or annul. (Just so, in a similar case, Bartolus said that there is a definite procedure established by law for surrendering an inheritance, apart from which procedure a surrender is not effected, even though an agreement to that effect has been made and acted upon.[c] He is followed by Decio,[d] and comes back to the same point in *Consilium* 72.)

Furthermore, I hold this view because the practice would be unfair to sons and others to whom dominion comes by succession; for [43] the sovereign cannot set aside such rights, according to the feudal law[1] and practice even in the case of minor fiefs.[e] Again, it concerns the subjects not to be brought under the rule of a new and strange lord (whence it is said that a king may not transfer a state to another ruler against the will of that state[f]).

But I should judge otherwise in case the authorization and consent of an overlord were granted (supposing the rulers to have an overlord), and the populace was little affected. Thus, in the time of our ancestors, when Charles of Anjou, Count of Provence, and Peter 5
of Aragon were claimants for the Kingdom of Naples and Sicily, with the consent of Martin IV,[2] Pope of that name, it was agreed that each sovereign, accompanied by a hundred of his knights, should engage in combat, and that dominion should rest with the victor. The battle was to be fought near the city of Bordeaux,[3] which was then under the rule of the King of England.

On the appointed day bright and early Charles appeared at the place with his hundred companions in arms; and, after waiting for his opponent up to the twenty-second hour, he withdrew. Promptly at that time Peter came upon the scene, and, finding no opponent, declared that it was no fault of his that the battle did not begin. And long [6]
thereafter there was a dispute as to which defaulted—he who had come

[a] *Consilium* 191, beginning *Nullo modo.*

[b] *De Re Militari*, VII. ii, iii, and iv.

[c] *Consilium* 212 (*Promitto tibi*).

[d] *Consilia*, 300, cols. 1 and 2; 225, col. 3; 236, last col. but one, no. 16; and 655.

[e] *Feuds*, II. lii and lv.

[f] See the canonists on *Decretals* I. xxxiii. 13; Innocent on *Decretals* II. xxvi. 15; Panormitanus on *Decretals* II. i. 16, col. 7, and on *Decretals* II. viii. 4, col. 6.

[1] [For *statuuut* read *statuunt.*—Ed.]

[2] [For *Martini .v.* read *Martini V.*—Tr.]

[3] For *Burdegalensi* read *Burdigalensi.*—Ed.]

at break of day, but did not wait, or he who had put in an appearance at the last moment—with implication that default at the end was more serious than at the start. However, the verdict of the outcome was otherwise; for the afore-mentioned rulers appealed again to arms, with unhappy issue at length for Peter.

## CHAPTER XVI

### WHETHER A CAPTURED GENERAL OF THE ENEMY SHOULD BE SPARED

### SYNOPSIS

1 Whether a captured military commander should be spared.
2 A dead man makes no war.
3 The head of Conradin was cut off.

My remark above that captured persons should not be dealt with harshly, together with the reference above to King Charles, recalls to
1 my mind another question, namely whether mercy should be shown to the leader of the enemy himself, if he chances to be taken. There is a passage in support of the affirmative [**43′**] in *Decretum*, II. xxiii. 1. 3—particularly if this leader be a man in regard to whom no breach of the peace is apprehended, as the statement there runs.

In comment on that passage, the Archdeacon explains the word *maxime* as 'only', assuming that a captured leader is to be spared only in the case where renewal of war is not apprehended—according to the
2 common saying: 'A man that is dead renews no war.' On the other hand, if there is danger of renewal of war, it seems to be implied that it is the safer course to make an end of the man.

3 And it is said by Martinus Laudensis,[a] that on the strength of this interpretation of the Archdeacon, Charles of Anjou had Conradin the Swabian decapitated. But Felinus records that when the sentence was read in the presence of the condemned man, as is the usual practice, Conradin turned to the judge and said: 'Vile chattel, vile chattel, are you not aware that peer has no jurisdiction over peer?' And this is related by Collenuccio, too, in his history of Naples.

[a] *De Milite*, qu. 51.

## CHAPTER XVII

### WHETHER A CHRISTIAN KING SHOULD ENLIST THE SUPPORT OF AN INFIDEL RULER

### SYNOPSIS

1 David took refuge with infidels.
2 Solomon made a marriage alliance with an infidel.
3 King Asa hired an infidel king for service against the Hebrew people.
4 Alliance of an orthodox ruler with an infidel against another infidel is permissible.
5 The Maccabees made alliance with the Romans.
6 Even Abraham took foreigners with him into battle.
7 The orthodox at war with one another should not have recourse to the help of infidels.
8 Compacts to 'regard friends as friends and enemies as enemies' should have the qualification: 'without doing injustice'.
9 An unlawful oath is not to be kept.

SOMETHING also has been said above of compacts made by lords and rulers. We must ask, then, whether it is permissible for orthodox and Christian rulers to make alliances even with infidels, and to employ their aid and support.

And that this is permissible would seem to be proved by the case of David, that man after God's own heart, who, in his flight before 1
Saul, took refuge with the King of Gath,[a] and returned with the latter and the other Philistines in their drive against Saul.[b] And David sent [44] envoys to bear his condolence to Hanun, King of the Ammonites, on the occasion of the death of his father, because the latter was a friend who had shown him kindness.[c]

Likewise David's son Solomon made an alliance of friendship and marriage with the King of Egypt. This we read happened before his 2
sin, and before his building of that most marvellous temple.[d] And he also entered into alliance with the King of Tyre.[e]

King Asa, too, who is reckoned among the good (and of whom it is written that he did right in the sight of God, as did David his 3
father), hired the King of Syria to fight against Baasha,[f] King of Israel. And it is said[g] also that Ahaz, King of Judah, sent envoys with treasure to the King of Assyria to hire him to fight in his behalf against the Kings of Syria and Israel, who had made war upon him.

But I think a distinction should be made according as alliance is entered into with an infidel against another infidel, or against another 4
orthodox person. In the first case (e.g. when the Emperor Charles V entered into alliance with the King of Tunis[1] against Barbarossa, the pirate chief, who had seized Tunis and invaded that realm; or if at any

[a] See 1 *Samuel*, xxvii [2].
[b] See 1 *Samuel*, xxix [2].
[c] See 2 *Samuel*, x [2].
[d] 1 *Kings*, iii [1].
[e] See 1 *Kings*, v [12].
[f] See 1 *Kings*, xv [18 ff.].
[g] 2 *Kings*, xvi [8].

[1] [Mulei Hassan.—ED.]

time he assisted[1] with advice or arms the King of the Persians, whom they call Sofi, against the Turks) I think this action was and is permissible. For what is of more advantage to Christians than that Satan be divided against himself, and likewise all his members—to which category all Mohammedans belong? For just as for us who are orthodox it is expedient that we be united and agree (as is said in *St. John*[a]—whence also Paul[b] urges us to endeavour to keep the unity of the Spirit in the bond of peace, and declares[c] that we are all one), so contrariwise it is desirable that infidels be split up and divided.

5 This view fits with the fact that the Maccabees made alliance with the Romans; for they did not enter into that league against their own 6 people, but against Antiochus, who was forcing them to idolatry. So also Abraham took with him Mamre and others of the Amorites who were his allies, when he rescued his nephew Lot and the people of Sodom from other kings.[d]

7 But in the other case, i.e. when there is war between the orthodox, I think that such alliance and support should be left severely alone. This is indicated by the same passages above adduced in support of the contrary view. For the prophet Hanani[2] reproved King Asa for calling in such aid, saying to him: 'Thou hast done foolishly; therefore, from henceforth thou shalt have wars.'[e] Moreover, Ahaz was the worst of kings, and he was not helped by the aid he enlisted—in fact he was despoiled by the very people whose assistance he had solicited.[f]

Christian kings, therefore, should take to heart what the prophet said to the excellent King Jehoshaphat [44′]: 'Shouldest thou help the ungodly, and love them that hate the Lord? Therefore[3] is wrath upon thee from before the Lord', &c.[g] Note too what another prophet said to King Amaziah: 'Oh king, let not the army of Israel go with thee; for the Lord is not with it. And if thou thinkest that wars are determined by the strength of armies, God shall make thee fall; for', said he, 'God hath power to help and to put to flight.'[h]

As regards the story of David, who returned with the Philistines to fight Saul, the caution of the Philistines was not unreasonable in ordering him to be sent away[i] because of their fear that he might turn against them when actually on the field of battle. For we could conceive that he might have so acted, if we were to take into account what he did during the time when he was with the above mentioned King of Gath.[j] For, pretending to raid his own people, he attacked the Amalekites (who were his enemies, and friends of the king) and other neighbouring peoples, butchering them all to a man, so that there might be no survivor to accuse him of treachery and wrong. (We must admit, however, that his action was justified; for these were all

[a] xvii [21 ff.].
[b] *Ephesians*, iv [3].
[c] *Galatians*, iii [28].
[d] See *Genesis*, xiv [13 ff.].
[e] See 2 *Chronicles*, xvi [9].
[f] See 2 *Chronicles*, xxviii [20 ff.].
[g] See 2 *Chronicles*, xix [2].
[h] [See 2 *Chronicles*, xxv. 7 ff.].
[i] [1 *Samuel*, xxix. 3 ff.].
[j] See 1 *Samuel*, xxvii [7 ff.].

[1] [For *iuit* read *iuvit*.—Tr.]
[2] [For *Hanam* read *Hanani*.—Ed.
[3] [For *iccirco* read *idcirco*.—Tr.]

enemies of his nation, and they were occupying land granted by God to the Jews.)

The other examples belong rather to the first case. This same problem is considered also by Joannes Lupus,[a] a Spaniard.

[a] *De Confederatione Principum.*

And that question he treats conjointly with another, namely 8 whether leagues and compacts are binding which are made between Christian rulers (even with the sanction of the Pope), with the provision that the contracting parties shall hold the friends of all as friends, and the enemies of all as enemies. And he concludes that these pacts do not hold, because they encourage wrongdoing—especially when a confederate of mine either begins an unjust war, or defends himself in an evil cause. See there at length.

He might better have said that these pacts do hold, but with the proviso: 'without doing injustice'. For we have seen already that the occasion for war must be just. And, acting simply on natural reason, both the orthodox and the pagan are bound to look to, and scrupulously observe, the claims of justice under the fetial law, which I have 9 described above.

[b] *Decretum*, II. xxii. 4. can. 3, 4, 5.
[c] [1 *Samuel*, xxv. 22.]
[d] *Decretum, ibid.*, can. 2 and 6; so also, with comment, *Decretals*, V. xii. 4; *Sext*, II. xi. 1; *Decretals*, II. xxiv. 23 and 16.
[e] *On Dig.* XXIX. v. 3.
[f] Pt. VI, chap. i, no. 5, near middle.

For he who has promised to defend another is not obligated to him for lawless ends, especially if the injustice is clear and evident; for it is better in such a case to violate the pact.[b] Thus David acted far more justly in disregarding the oath which he had sworn in regard to destroying Nabal[c] than did Herod, who, on account of his oath, put to death a very righteous man.[d] This view is supported by a statement of Angelus[e] to the effect that, in the case of such compacts, even though aid in general and of all sorts is promised, there is no obligation to wrongdoing. This will be considered more in detail later.[f]

[45] The general question is treated by Oldradus,[g] who is quoted verbatim by Corsetti,[h] both declaring that these pacts are permissible and lawful. So also said Martinus Laudensis.[i] But all are very barren and perfunctory, and they are not in accord with the teaching of 2 *Chronicles*, xvi and xxviii—passages that were overlooked. Albericus[j] discusses the subject, but with little more fullness, merely agreeing with Oldradus. Consequently, I do not think that we should call such alliances allowable, unless with the reservation above specified.

[g] *Consilium* 71, beginning: *Numquid Christophorus.*
[h] *De Potestate ac excellentia Regia*, qu. 83.
[i] *De Bello.*
[j] *On Code* VIII. iv. 1, at end.

# CHAPTER XVIII

## SUPPLEMENT TO THE CHAPTER ABOVE: WHETHER THINGS CAPTURED BECOME THE PROPERTY OF THE CAPTORS

## SYNOPSIS

1 Among Christians, people captured in war against the Emperor are not enslaved.
2 Things captured should be put in the charge of the head of the army.
3 The commander of the army should divide the spoils of the enemy in accordance with the valour of the soldiers.
4 At times the plunder becomes the unquestioned property of the captors.
5 Rule for dividing the spoil of the enemy derived from the Mosaic law.
6 How spoils taken from the enemy are divided by the Mosaic law.
7 One-tenth of the spoil dedicated to God.
8 Immovables belong to the sovereign;
9 And the general cannot give them away.
10 Soldiers ought not to harm the unoffending. And if, in passing through, they injure the provincials, it is right for the latter to attack them.
11 A man captured in war shares the status of inanimate things.
12 A Christian may not enslave a captive taken from among Christian enemies.

With regard to the statement above that things taken in war, whether animate or inanimate, become the property of the captors,
1 Saliceto[a] declared that to-day Christians are not made slaves of the captors, going so far as to say that this is true even though the Emperor himself has declared the war.

[a] *On Code* VIII. l. 12, no. 7.

But Bartolus[b] denies this; and he is followed by Baldus,[c] who says that in his time when Count Bergaminus de Martiano died in captivity after making a will while in that status, there was a great controversy about it, because the claim was made that the Emperor with whom he was at war, had died [45′] before the count in question was captured, hence the war had come to an end, and therefore it was lawful for the said count to make a will; whereas if he had been taken before the death of the Emperor, without question he would have died in a state of enslavement, and the will would have been invalid.

[b] *On Dig.* XLIX. xv. 24, col. 3, words *et ideo puto quod civitates.*
[c] *On Code*, VII. xiv. 4.

Baldus, then, here takes two things for granted; first, that by the death of the Emperor the war which he had declared was brought to a close; and second, that a man captured in that war would have been a slave. I have grave doubts on both these points, and I shall have something to say of both in another passage in this treatise.

In regard to the case of this count, Baldus elsewhere[d] repeats his verdict, saying that he had heard from elderly advocates that there was a sharp discussion about the count's estate. And he affirms that

[d] *On Code* I. ii. 1, col. 8, qu. 14.

the man would without question have been the slave of the captors, if he had been taken while the Emperor was yet alive; but he is uncertain about the validity of the will, in view of the fact that the count was captured after the Emperor's death and—as was assumed—the war had thus been brought to a close.

With reference to my original statement that people are enslaved who are captured in a war declared by the Emperor, there is confirmation in what I have said above[a] and in what I shall say below.[b] But Alciati[c] has attempted to introduce a new heresy to the effect that among Christians captives are not enslaved, and further that things captured do not become the property of the captors. And he attacks the theologians who say otherwise, calling them silly talkers, i.e. mere wind-bags.

[a] Pt. II, chap. xi.
[b] Pt. IV, chap. i, at the beginning.
[c] *On Dig.* L. xvi. 118.

Again, regarding the original statement that things captured 2
become the property of the captors, question might be raised on the basis of a passage[d] in which it is said that such things fall to the army commander. But this should be understood merely with reference to custody, as a gloss[e] points out—or, better, in the sense that later the 3
commander is to divide the spoils among the soldiers in proportion to the valour and the deserts of each.[f] But Saliceto[g] makes a distinction according as the plunder is taken in the enemy's territory without any battle (and then it belongs to the captors), or in connexion with an 4
engagement.

[d] *Decretum*, II. xxiii. 5, 25.
[e] *On Decretum* I. i. 10, above cited.
[f] Same gloss; so *Numbers*, xxxi [26 ff.]; *Joshua*, viii [2 and 27]; *Decretum*, II. xxiii. 5, 25.
[g] *On Code* VIII. l. 12, col. 2.

In the second case, suppose that a part of the soldiers do the fighting, while the rest are in ambush, or stand drawn up in line to act as a reserve for the troops engaged, or even remain behind to guard the baggage; then the plunder is turned over to the general, who will divide it according to the deserts of the soldiers—including those who had no part in the battle.

This squares with the view of Baldus,[h] who cites the example of King David.[i] And he also makes the statement[j] that things captured become the property of the captors; but that they must be turned over to the general, and divided by him in accordance with the valour of the soldiers, in such a way that the braver have the better lot, while the lazy or the cowardly have nothing.

[h] *Ibid.*
[i] 1 *Samuel*, xxx [22 ff.].
[j] *On Code* VIII. liii. 36.

And the logic of this is perfectly sound; for the energetic men are eager for the strife, and for putting the enemy to flight and for laying them low, whereas in the meantime the sluggards have an eye to plunder and spoils. But if all were to look out for [**46**] plunder and seek for gain, the battle might perhaps be renewed with heavy loss to the victors. For in this way victorious armies have not seldom been routed, and assured success has slipped from their hands.

That the Romans, too, followed this procedure is shown by the lines of Virgil:[k]

[k] *Aeneid*, II [761 ff.].

> And now in empty halls of Juno's shrine,
> The chosen guards, e'en Phoenix and Ulysses dire,
> The plunder keep. Here all the wealth of Troy
> From flaming temples reft—the god's own tables,
> Solid golden bowls, and captured vestments—
> Pile they up.

Generals, therefore, should not countenance this unfairness,[1] nor take such chance and risk.

5 According to the law of the ancient code we read that the practice
6 was different. For all the things having life were turned over to the general, who divided them both among those who had gone forth to battle, and among the others who had remained behind—a half to one party, and the remainder to the others; but things inanimate were the property of the captors. So we find in *Numbers*;[a] for unless you so understand that passage, the last words there 'for what each had seized in the plunder was his own' would conflict with what precedes in that chapter.

[a] xxxi [26 ff.].

7 And here I note in passing that, according to this code, out of the plunder one in five hundred of the things having life was set aside as a first-fruits offering to God, but out of the part which fell to the people who had not fought, one living thing in fifty was set aside as a tithe for the priests and Levites.

And not only do we read in the chapter above cited that this was the practice among the people who worshipped the true God; but even those who knew not God and worshipped idols often vowed a tenth of the spoils to Hercules in the hope that, being valiant, he would aid the valiant. And at times such a vow was made to Apollo, as in the case of Camillus when he took Veii. So sometimes even to Vulcan.[b]

[b] [e.g. Livy, XXIII. xlvi. 5.]

But what little regard our generals have for human or even divine regulations, is all too evident. Out of the spoils I have seen hundreds of pieces of gold given to an actor, and a few dollars to a brave soldier who had even been crippled in battle—with not even a copper for God Himself or for His ministers, the latter indeed getting off well if (even in the taking[2] of those cities which have been lost through the fault of our soldiers and are recovered and retaken by us) any regard is shown for God and His worship. Little wonder then that He brings evil destruction upon the wicked, and punishes His enemies at the hand of their foes! But, as the saying is, Plato forbids us to go into detail.

Jason also, following others,[c] treats this question, namely to what extent things captured in war become the property of the captors, and what is the time limit, and how they are apportioned.

[c] *On Dig.* XLI. ii. 1, at the beginning.

8 But immovables belong to the Emperor, according to *Digest*, XLIX, xv. 20, § 1, and Bartolus on *Digest*, XLIX. xv. 28, where

[1] [i.e. of indiscriminate seizure on the part of the soldiers.—Tr.]
[2] [For *expugnationem* read *expugnatione*.—Ed.]

[a] Addit., *ibid.*

Alexander[a] states that the army head may not distribute these immovables. [46′] This bears on a case of frequent occurrence in our days. For 9
the generals of the French have seized, confiscated, and given outright to their soldiers the possessions not only of people in the service of the duke or Emperor, but also of those who hold possessions from them but reside elsewhere—not excepting the clergy and monks. Now, if after peace is made, those soldiers should be sued for restitution of income, their case would be weak. For inasmuch as the army head had no right to make these grants, the soldiers did not acquire title to the income—unless the terms of the peace pact are so generously framed as to protect them.

And while it is permissible for soldiers to plunder in the enemy's 10
lands, the case is different when an army, marching against the enemy, passes through the territory of others; for then it should not inflict loss on the inhabitants: As we read in *Numbers*:[b] 'We shall go by the king's highway, we shall not turn to the right hand nor to the left, until we shall have passed by thy[1] borders. We shall not pass through the fields or through the vineyards; and if we shall drink of thy water, we will give what is right, nor cavil about the price.' This is repeated in *Numbers*, xxi [22]. Among the jurisconsults, Angelus[c] says the same, adding that if soldiers inflict losses in passing through, it is permissible to resist and even to assail them.

[b] xx [17 ff.].

[c] *On Dig.* VIII. iii. 7, in last prin.

On the subject of prisoners, one further idea advanced by Baldus[d] 11
is to be noted, namely that a man taken in war changes from a person to a thing, and is rated like an ass or some other movable. This means that such prisoners become slaves of the captors; and in regard to a war declared by the Emperor, this was the view of all the early Doctors, according to Calderinus.[e]

[d] *Consilia*, II. 358.

[e] *Consilia*, I, *De Treuga et Pace*, col. 3, words *et dicit Innocentius.*

Saliceto,[f] however, declares that this rule is obsolete to-day, and that 12
enslavement and servitude are replaced by a ransom imposed upon the captive. This view has now gained ground; and it is supported by a passage in *Digest*, XLIX. xv. 21. § 1. I shall treat this point more in detail later.

[f] *On Code*, VIII. l. 12.

Socinus[g] raises the question whether it is permissible to take an enemy prisoner, if he is found in the territory of a third party, i.e. outside the boundaries of the belligerents. He presents arguments on either side, and concludes at length that this is not permissible, citing Angelus,[h] and rulings in *Code*, I. xii. 5 and 6. There is support, too, in the statement of Bartolus[i] that a person arrested in another's territory, even by the officers of a local judge, is not legally arrested and his release may be demanded—a view that Panormitanus[j] reports and accepts.

[g] *On* [*Dig.* XLIX. xv.?] 1, at beginning, col. 1, words *item praedicta.*

[h] *Disput.* beginning: *Renovata guerra.*

[i] *On Dig.* XLVIII. ii. 7. § 5, clause 2 (*quaero*).

[j] *On Decretals* III. xlix. 6, col. 8.

The opposing view finds support in the fact that it is said that a proscribed person, who by virtue of the character of the statutes may

[1] [For *suos* read *tuos*.—Tr.]

be killed at will, can be slain outside the territory of those who make the statutes; so Baldus.[a] [47] For in the case of a citizen of Arezzo who kills his outlawed townsman in the territory of Florence, Baldus says that the territory of Florence is free and safe for the outlaw with respect to the Florentines, but not with respect to the people of Arezzo and the enemies by whom he was disowned. Hence it is the view of Baldus that the slaying was permissible so far as[1] the parties themselves were concerned, but not with respect to[2] the Florentines; and that a judge of theirs might therefore punish the slayer, should he fall into his hands. So also said Felinus.[b]

On *Code* VI. i. 2,[c] Baldus takes the same ground. For he there says that a process begun against a person captured in another's territory is valid, and that execution is equally valid. However, he says, a judge of the territory in which the arrest was made may punish a local injury.

There is further support in the dictum that wherever a general is with an army, that is his 'territory'.[d] Hence also Baldus[e] said that a general who is in another's territory may yet punish a criminal.

Notwithstanding all this, I think it safer to hold with Angelus and Socinus that such capture is not permissible. For the above procedure in the case of a proscribed person is a detail allowed or forbidden in dealings between individuals and varying with the locality, whereas we are speaking of what is permissible under the law of nations and of war. And where there are separate jurisdictions and territories, it is not right for the commander of an army to allow infraction and disturbance of the peace of the territory of another, with whom he has no quarrel.

And if enemies cannot be made prisoners in another's territory, consider on what grounds, when cities are plundered, wretched provincials may be seized in churches—which belong not less to another's territory than do outlying lands (as we note Socinus[f] argues in regard to them on this same question, citing *Code*, I. xii. 5 and 6). But whatever the law may say, the greed of the soldiery and their heathenish irreverence take small account of such immunities. And would that even holy persons and appurtenances were spared!

What is said above is supported by the view expressed by Joannes of Imola[g] to the effect that even where war is justified, it cannot be pressed against an outsider's subjects who chance to be found in the enemy's territory, but who do not mix at all in the activity of war; and a captured enemy cannot be taken to the captors' base by crossing the territory of a third party. For that ought to be altogether safe ground even for those in transit. So Imolensis.

[a] *On Code* I. i. 1, col. 7, words *sed hic quaeritur si bannitus.*

[b] *On Decretals* I. ii. 7, col. 3, words *octavus casus.*

[c] Words *quid ergo si iudex.*

[d] Bartolus *on Dig.* L. xvi. 239, § 8.

[e] *On Dig.* I. xviii. 3, 2, words *quaerunt doctores utrum dux exercitus.*

[f] [*On Dig.* XLIX. xv.?] 1, above cited.

[g] *Consilium* 51, beginning: *In casu praemisso.*

[1] [For *quo ad* read *quoad*.—Ed.]

[2] [For *quo ad* read *quoad*.—Ed.]

[47]

# HERE BEGINS
# THE THIRD PART OF THE WORK

# CHAPTER I

## ON RETURN BY POSTLIMINY

## SYNOPSIS

1 Postliminy arises from the law of nations.
2 Postliminy defined.
3 Postliminy; to whom it applies.
4 It does not apply to persons who have surrendered.
5 A free man's wrong-doing is worse than a slave's.
6 *Praescriptio* [*longi temporis*] has nothing to do with postliminy.
7 Arms have no postliminy.
8 Postliminy of peace and war.
9 Interpretation of *Digest*, XLIX. xv. 12, at the beginning.
10 Interpretation of *Digest*, XLIX. xv. 5, § 2, and XLIX. xv. 12, near the beginning.
11 A person apprehended when war is renewed can be made a captive, even though he arrived on the ground while peace yet prevailed.
12 When things captured become the property of the enemy, and when they return to their former status.
13 When goods recovered from the enemy are to be restored to their former owners.
14 A person born in captivity even of parents lawfully wedded is not legitimate in the eye of the law:
15 And he does not have the right of postliminy:
16 And cannot inherit from his father, except on the basis of special decrees.
17 A person dying in captivity[1] among the enemy transmits a heritage from his father, but not from his mother.
18 A son whose father is in captivity among the enemy may not break up the father's estate.
19 Acquisition of an inheritance is kept pending while a person is in captivity among the enemy:
20 So also if he has been ransomed, but has not yet reimbursed the ransomer.
21 The heir of a person ransomed is not bound to reimburse the ransomer.
22 The guarantor of the ransom of a captive is not liable for the amount, if the man dies meanwhile.
23 The sale of property belonging to the enemy is not valid.
24 The sale of things seized by the enemy is valid.
25 When a pupillary testament is valid in case the father becomes a slave of the enemy. And what if the son is captured?
26 Interpretation of *Digest*, XLIX. xv. 11.
27 The enemy, too, have postliminy, even with respect to things which they have taken from us.
28 If things taken by the enemy and recovered are again taken by them, do these things revert to the earlier status?

1 [48] POSTLIMINY rests upon the same law as do war, captivity, and
2 enslavement.[a] It consists in the right of recovery of something in the possession of the enemy.[b] However, this right does not pertain to all persons or to all things lost in war, but only to those singled out by law or by custom.

3 As for human beings, it applies normally to all such—to slaves as

[a] *Decretum*, I. i. 9.
[b] *Dig.* XLIX. xv. 19, at the beginning.

[1] [See, however, what is said in the text under this number.—TR.]

well as to free men,[a] but not to persons who have surrendered to the 4
enemy: so vital is the distinction between being taken by force, and surrendering voluntarily through fear.[b] Hence Baldus[c] notes that soldiers should beware of surrendering, because they thus lose the right of postliminy, which is a deep disgrace for them. But this disgrace, says he, even then was little regarded.

In the second place, exception is made in the case of deserters.[d] However, if the man is a slave, there is the further qualification that his desertion and wrong-doing do not impair his master's right over him if he is recovered. And in this particular the position of a master 5
will be found more favourable than that of a father. For the latter does not again receive under the *patria potestas* a deserting son who is recovered.

Unless I mistake, the reason is that the son is penalized because, though a free man, he has scorned his country and stooped to such crime and disgrace (for military discipline among the Romans took precedence over the affection even of a father, as is stated in *Digest*, XLIX. xv. 19, § 7). But in such a case a slave does not commit so great a wrong as does a free man. So this will fall under the head of acts for which the noble are punished more severely than the ignoble. See *Digest*, XLVIII. xix. 14, and also the statement of Baldus[e] that since high station augments wrong, the noble's sin is blacker than that of a common person. For who would expect in a slave other qualities than those of his station?

Furthermore, exception is made in the case of persons who by treaty have the right to return to their own people, but prefer to remain among the enemy.[f] And this is logical; for they would not enjoy the right of postliminy, even if they returned to their people temporarily without intending to remain. Thus Atilius Regulus had not the right to make a will or to transact any other business, even while he was in Rome, inasmuch as he purposed to return to Carthage.[g] [48′]

Aside, then, from the cases above specified, all persons return by postliminy to the same status they held at the time they were captured.[h] And this right pertains not less to those who have escaped from the enemy by stratagem or through favour, than to those who make good their escape by force and soldierly courage.[i]

This right pertains to lands also. Hence, the former owner will 6
recover a field occupied by the enemy, just as soon as it is regained by invasion or by treaty.[j] And this I think true despite any lapse of time, whatever its length and extent. For what action for recovery[1] was open to the owner during all that time? Or what plea of possession could be validated against one who was not in a position to sue?[k]

As for the method of securing the owner's interest after recovery,

[a] *Dig.* XLIX. xv. 19, at the end.
[b] See *Dig.* XLIX. xv. 17.
[c] *On Code*, VIII. xlvii. 7, last col.
[d] *Dig.* XLIX. xv. 19, § 6.
[e] *On Code* I. i. 4.
[f] *Dig.* XLIX. xv. 20.
[g] See *Dig.* XLIX. xv. 12, § 9; *ibid.*, 5, § 3; *ibid.*, 26.
[h] See *ibid.*, 6 and 12, §§ 1, 10, 12, and 15; *ibid.*, 14, § 1, at end; so many laws of *Code*, VIII. l.
[i] *Dig.* XLIX. xv. 26.
[j] *Ibid.*, 20, § 1.
[k] See *Decretum*, II. xvi, 3. 13, at end.

[1] [For *vĕdicandum* probably *vindicandum* should be read.—Tr.]

whether by annulment proceedings or by reinstatement in full, there are notes on *Digest*, IV. vi. 46. But though there be variation in the method and forms, the fact itself remains unchanged, as Baldus remarks on this law—which latter affords the strongest support for vindicating the owner's claim without regard for lapse of time.

And this is a case that could easily develop when a king has acquired a province or a realm, presenting its castles and lands to his followers—as the French did at one time in the Kingdom of Naples and the Duchy of Milan. For should he lose the province, and again retake it even after a long interval, those earlier beneficiaries and their heirs could claim once more the old-time holdings.

Ships, too, have postliminy—not all, but ships of war;[a] so also horses.[b] If, therefore, my horse should fall into the hands of the enemy and later should return to us, he must be restored to me, unless a ransom has been paid for him (in that case I shall regain possession after the price is refunded to the ransomer).[c]

I hold the same view with regard to a horse which a servant has stolen, deserting with it to the enemy.[d] But if both horse and owner have come into the enemy's power by surrender, and the owner by some chance regains his freedom, and then the horse returns to us, the right of postliminy will not pertain. For it has already been said[1] above that postliminy is not a privilege of those who surrender.[e]

7 It is held that arms—because generally not lost without disgrace—and, likewise, military dress do not return by postliminy to their first owners.[f] Hence[2] the word of the Spartan woman to her son as she held out his shield to him: '[Return] with this, or upon it.'

We must recognize, next, that as there is enslavement in war and 8 in peace (as already shown above), [**49**] so also postliminy appertains to both these conditions. However, the status of those who are taken in war and of those who are arrested in time of peace is not one and the same. For persons captured in war enjoy postliminy both in war and in time of peace; whereas if a man is arrested in time of peace, and afterward there arises between those nations a war which is concluded by a peace pact, the case of the man arrested in time of peace is not covered by the pact, unless the latter is drawn up in such generous terms that another verdict is called for.

9 And the reason for this difference is found in *Digest*, XLIX. xv. 12, at the beginning, namely that the Romans desired that the hope of returning home should rest on soldierly courage rather than upon the making of peace. However, a gloss there understands that those who are recovered in war always enjoy postliminy, and that compacts to the contrary do not hold; whereas those recovered in time of peace may

[a] *Dig.* XLIX. xv. 2.
[b] *Ibid.*
[c] Cf. *Dig.* XLIX. xv. 6 and 12, § 7.
[d] According to *Dig.* XLIX. xv. 27.
[e] See *Dig.* XLIX. xv. 17.
[f] *Dig.* XLIX. xv. 2 and 3.

[1] [Reading *sit* for *erit*.—Tr.]
[2] [Connect this with the parenthetic phrase in the first line of the paragraph.—Tr.

lose this right. For my part I do not see, in the first case, how those who are already recovered are dependent upon a compact or why they need fear the same; and the gloss would have done better to draw the distinction between those lost in war and those lost in peace. But any one who does not approve my interpretation above given is at liberty to follow his own or that of the gloss.

And though the laws in *Digest*, XLIX. xv. 5, § 2 and XLIX. xv. 12,[1] 10
seem to be at variance, still in reality they do not conflict at all. For the first refers to a person who goes among an unknown people, with which there is no alliance of peace or friendship, whereas in the other it appears that peace had already been made with the nation in question.

Moreover, the situation described in *Digest*, XLIX. xv. 12, is worthy 11[2]
of note, and it was my fortune to render a decision upon it. For a man belonging to the French had come into a fortified post of the Emperor's in a time of truce; and after war broke out unexpectedly, the captain of the post arrested the man, compelling him to effect his ransom by executing a bond. My decision was that he was lawfully captured, to which judgement I was moved by the above-cited passage.

Again, it must be recognized that the soldiers commonly hold that persons—and the same is true of things—do not pass immediately 12[2]
into the control of the enemy upon capture, but after they have remained twenty-four hours in the hands of the captors. So Angelus[a] reports, saying that mess-mates declare that plunder is never fully their own, unless it has been in their possession overnight.

[a] *On Code* VIII. l. 2.

The laws, however, do not so state, nor does this appear to me reasonable. For it may happen that soldiers acquire ownership of plunder in a shorter space of time, whereas, under other circumstances, they might not acquire it in a much longer period. Thus, assume that even for three days they should hide in a forest [with their loot], being unable to rejoin their friends, or suppose that within an hour they return with their plunder within their own lines. In the former case would they be said to have become owners, and in the latter will they not be at once so declared? More rational, then, is the ruling of the law that the plunder becomes theirs the instant they have regained their own lines.[b]

[b] *Dig.* XLIX. xv. 5, near the beginning.

And this may be a consideration of large importance in connexion with things which do not enjoy postliminy [**49′**]. For suppose that the enemy seize my cattle and conduct them at once within their lines, and a little later, after caring for and resting their horses, they set out for another point before the twenty-four hours have passed, and thus fall in with a division of our soldiers, who rescue the cattle from them. In that case the cattle will surely belong to the soldiers who recovered them,

[1] [Belli's citation is *l. in bello.* §. *in pace*, the addition of §. *in pace* being apparently a slip, as there is no such section of the law in question.—Ed.]

[2] [These numbers in the Latin text do not follow the Synopsis.—Tr.]

and they will not be returned to me; for they had ceased to be mine, having become the property of the enemy as soon as they passed within their lines. But suppose that even for four days the enemy had possession of my cattle, lurking in the woods or elsewhere, because afraid to return to their friends, and in that interval the animals are retaken by our soldiers. Then the cattle will be mine, not yet having become the property of new owners.

Following others, Jason treats this subject on *Digest*, XLI. ii. 1, near the beginning,[a] though he does not differentiate in the same way as I. Ripa also comments here,[b] and introduces another distinction according as the recovery is made by hired soldiers or volunteers. This distinction is not recognized by the law. He goes wrong also in his interpretation of *Code*, VIII. l. 12 and *Digest*, XLIX. xv. 20, § 1, failing to note that under those laws restitution is brought about by the right of postliminy, whereas his distinction as to hired soldiers or volunteers originated with Calderinus.[c]

[a] Col. 3.

[b] *Ibid.*, col. 2.

Again, just as captured persons become the property of the captors as soon as they are brought within the latter's lines; in like manner,[1] if they escape from the hands of their captors, they do not at once become their own masters nor revert to their former status, but only after they have regained our lines, or at any rate have reached a king or nation that is allied and friendly to us.[d] The reason for this ruling is stated in *Digest*, XLI. i. 44, near the beginning.

[c] *Consilia*, I, *De Treuga et Pace*, col. 3, words *aut talis capiens.*

[d] *Dig.* XLIX. xv. 5, at the beginning; *ibid.*, 19, § 3.

13 But my claim that goods which have not yet become the property of the captors should be restored to the owners who held them before capture does not harmonize with the statement of Giovanni d'Andrea, quoted by Alexander,[e] to the effect that, without any reservation at all, such property should be restored to them. They cite the regulations in *Digest*, XLI. i. 44, and *Code*, VIII. l. 12, and from history they assemble not a few cases where things captured by the enemy and kept for many days—being even brought within their lines—nevertheless were restored to the former owners. For example, Lucretius Tricipitinus displayed in the Campus Martius the plunder which the Volscians and Aequians[2] had captured in the Roman territory and in that of their allies, the Hernicians, directing that whatever any one claimed as his own within three days should be restored to him.[f]

[e] *On Dig.* XLI. ii. 1, at the beginning.

[f] So Livy, III [x. 1].

Again, the Dictator Aulus Postumius returned to the Latins and Hernicians plunder which had been carried off many days before by the same Volscians and taken within their strongholds.[g] So also Aulus[3] Postumius and Lucius Julius restored goods seized by the people of Tarquinii, allowing two days for the presentation of claims.[h] [50] Likewise Volumnius restored things captured by the Samnites, summoning the owners by edict, and setting a date for the Campanians, allies of

[g] So Livy, IV [xxix. 4].

[h] See Livy, V [xvi. 5 ff.].

[1] [Omit *&* before *ita*.—Tr.] [2] [For *equi* read *Aequi*.—Tr.] [3] [For *Aure.* read *Aul*[*us*].—Ed.]

the Romans, to claim their possessions.[a] In fact in the Second Punic War also the proconsul Gracchus[1] ordered the restitution of plunder, allowing thirty days for claiming property.[b]

But as for the citation of *Digest*, XLI. i. 44, it appears that the things there referred to as captured were recovered at once. And *Code*, VIII. l. 12, has to do with human beings, who have postliminy after any lapse of time. Moreover, the above precedents do not constitute a rule; for we find that by law other provisions are actually made. And although Martinus Laudensis[c] says without qualification that things captured are to be returned to the original owners, he speaks in a very uncritical fashion and without reckoning with the laws cited. But surely the question should be judged and settled in accordance with these.

And although in the wars which with too great frequency are waged among Christians there can be little scope (except in the cases above cited) for the laws of postliminy, especially those laws which have to do with human beings, still they may find application in the wars waged with the Turks and Moors, with whom the ancient law of nations is in force, so that many cases might arise in regard to which it will be necessary to have recourse to these laws of postliminy.

For suppose that a man and wife from Pannonia, or Hungary, as 14
it is called, are taken as captives into Thrace, and there, by her husband, the captive woman has a son, who by good fortune comes back to the fatherland; should we not have recourse to these laws? And here we must make a distinction according as he returns in company with the father or with the mother alone—so that in the first case he establishes agnatic relation with the father, and for that reason can inherit from him. But in the second case there is nothing of this, for he shares merely in the mother's status.

And the reason is that, since in his own person he does not enjoy 15
postliminy (in returning to an earlier status, which he really never held), and since there is no postliminy of the father to rehabilitate the son, the latter can have no postliminy, either active or passive, arising either from the father's person or from his own. This is the unique case in *Code*, VIII. l. 1; and in fact such a son is called bastard and fatherless by the jurisconsult in *Digest*, XLIX. xv. 25—a case without parallel, that one born of parents legally wedded be bastard.

Hence, the son in question will not be heir to his natural father 16
(so unfavourable to him are the civil laws, which in this case take precedence over natural laws), unless special relief is granted him by the Emperor (on the analogy of the relief afforded by the praetor to a person emancipated), or unless we are to suppose that provision has been made for him by the rescript of the deified Antoninus and his deified father.[d]

And what if a mother taken captive leaves behind in our state a

[a] See Livy, X [xx. 15].

[b] See Livy, XXIV [xvi. 5].

[c] *De Bello*, qu. 7.

[d] See *Dig.* XLIX. xv. 9.

[1] [*Gracus*, i.e. *Gracchus*.—ED.]

son who actually dies before her? Will not the mother's heir be the person most nearly related to her at the time of her death, and not the son or his heirs?[a] [**50′**] A case similar to this is presented in *Code*, V. xviii. 5, where it is said that if a wife is carried away captive, the husband is not bound to restore her dower before her actual death. And somewhat like is another case treated in *Code*, VIII. l. 3, where it is ordered that a trustee be appointed for the property of captives of this sort, i.e. persons who are in legal fiction dead, but in actual fact still living.

[a] So ordered in *Code*, VIII. l. 4.

17 And as for my remark above that the son does not transmit inheritance from his mother to his heir, even though, in case she dies among the enemy, legal fiction assumes her to have been dead from the very beginning of captivity, there is nothing strange in this. For, in the first place, actual death is the point of importance here, and, in the second place, the son would not transmit inheritance in a more extreme case, namely, if she were actually dead at the time of his death, but he had not been notified of her death.[b]

[b] *Ibid.*

This, however, does not apply to the father's case. For should the latter be among the enemy, and his son, left at home, dies without knowing of his father's death, he yet transmits the inheritance from his father to his own heir, in case it proves that the father was really dead. This is due to the right of self-succession. So *Code*, VI. lv. 8, which cannot otherwise be harmonized with *Code*, VIII. l. 4, as all the post-glossators note.[c]

[c] *On Code* VI. xiv. 3.

They admit, however, that even a self-heir has not full power of administration before notification of the father's death; hence contracts will not be valid which he has entered into regarding the father's 18 property. This Baldus[d] pointed out as worthy of note.

[d] *On Code* VI. lv. 8, words *sed opponitur*, and words *et ideo contigit.*

And just as in the case above mentioned the acquisition and administration of an inheritance is held in abeyance, such also will be the limitation upon possession of property granted to a person emancipated.[e] Hence if the patron be in the hands of the enemy and the freedman dies in the home country, the son of the patron (being likewise in the home country) will not have possession in the matter of his goods.[f]

[e] See *Dig.* XXXVII. iv. 1, § 4.

[f] See *Dig.* XXXVIII. ii. 4, § 2; so also gloss on *Dig.* X. ii. 23.

19 And not only is inheritance from a person in captivity held in 20 abeyance, but—what is really surprising—the same thing is true of a man who has been ransomed and has returned to his people, but who has not yet[1] reimbursed the ransomer.[g]

[g] *Dig.* XXXVIII. xvi. 1, § 4.

There is also another opinion worthy of note in regard to a person who has been ransomed, namely, that if he should die in the interval 21 before reimbursement, he would be released by his death from the obligation to the ransomer, so that his heir will not be liable for the amount. See the striking passage in *Digest*, XLIX. xv. 15, at the end.

[1] [*nundum*, i.e. *nondum*.—ED.]

Such a situation might develop even in these days, as in the case of a prisoner who has given a pledge and supplied a bondsman for payment on a certain day. Should he die before that time, neither 22
his heir nor his bondsman would be liable, according to the law cited. And this should not be forgotten.

Another present-day application of the law of postliminy might be made, if we ask whether a person may sell property of his (e.g. a city [51] or country estate) now in the possession of the enemy, and whether such sale would be valid. And it might appear that the answer should be negative, in view of *Digest*, XLV. i. 103, where it is stated that we 23
have no right to traffic in things belonging to the enemy.

But the other view is the sounder, that the contract holds by virtue of the prospect of postliminy.[a] Hence we read in Livy that when 24
Hannibal had reached the fourth milestone from Rome, and learned that the plain in which he was encamped had been sold for the price at which it was held before his arrival,[1] he was filled with wrath, and calling a crier, he ordered the sale of the bankers' chambers in the Roman forum.[b] And the sale of the land was valid, according to *Digest*, X. ii. 22 and 23, above cited, but the sale of the chambers was not valid because these were original properties of the enemy, and hence there was no place for the aforementioned prospect of postliminy.

[a] *Dig.* X. ii. 22, §§ 5 and 23; *Dig.* XXX. ix.

[b] Livy XXVI [xi. 6 ff.].

Postliminy concerns also pupillary testaments, if, after making such a will, a father is captured and dies in the hands of the enemy. This is a case that has many subdivisions.

For at times the father dies among the enemy, leaving a son below the age of puberty at home; in which case the will stands.[c] Or the son does not actually survive the father, and the will is invalidated.[d]

[c] *Dig.* XLIX. xv. 10; *Dig.* XXVIII. vi. 28, at the beginning.

[d] *Dig.* XLIX. xv. 11.

On the other hand, at times it is the son that is captured, and the father dies at home. In that case, make a distinction: (1) the son was captured while the father was still living, and then the will is made null, because, as I have pointed out, by legal fiction the son is regarded as dead from the first hour of captivity, and because he left no property in the state and, consequently, no heir: (2) the son was captured after the father's death, and the will holds.[e] Whether this is so as a matter of strict right or by favour of the praetor is a point discussed by the Doctors.[f]

[e] *Dig.* XXVIII. vi. 28, § 1.

[f] *On Dig.* XLIX. xv. 10, with gloss there, word *testamento*; and *On Dig.* XXVIII. vi. 28.

Moreover, at times both father and son are captured, the father first and the son afterward. In that case, if both die in captivity the will is void—though this may seem strange, in view of the fact that both by legal fiction are regarded as dead from the first hour of captivity, so that the father, being first to be captured, is in fiction first to die. And it seems particularly strange in case the father in actual fact died first, whence it might appear that the pupillary testament should stand.

[1] [For *aductum* read *adventum*.—Tr.]

25 But a gloss[a] meets this objection by saying that, in regard to the ruling that the will holds when a son is captured after the death of the father, the reference must be to natural death, and not to the death of legal fiction; for a captive father, despite the fiction of death, may yet return. So also says the Glossator in the last gloss on *Digest* XXVIII. vi. 29, where there is a case in point. This gloss states that though the condition of a son who is at home is meanwhile independent, yet his status is unsettled in view of the aforementioned possibility of the father's return (on this there is a good passage in [51'] *Digest*, XLIX. XV. 22, § 2).

[a] *On Dig.* XXVIII. vi. 28, words *ex eadem lege*, at the end.

And so if it chances that the father die in actual fact (the time of which must necessarily be looked into), and the son is found at that time to be incapacitated to succeed to the father's estate, it follows naturally that the father's will becomes null, and, consequently, that a pupillary testament is void also.[b]

[b] *Inst.* II. xvi, § 5.

26 This, however, seems in conflict with a passage in *Digest*, XLIX. XV. 11, unless we are to understand that the Lex Cornelia supports the claim of the substitute heir not otherwise than if, i.e. only if, after the death of the father among the enemy, the son returns and dies at home; in which case the words 'not otherwise' will stand, not in the comparative, but in an inferential sense. But the Doctors do not touch this point.

Again, the laws of postliminy concern the case described in *Digest*, XLIX. XV. 12, § 5, in that they sustain the codicils of a captive who has executed a will before being taken by the enemy—provided, however, that he returns to his people.

These laws apply also to a case where a captive dies among the enemy, having previously executed a will, with subsequent acknowledgement of a new-born son who dies before him. For under these conditions the heir named in the will may not succeed to the inheritance, and the will is void on account of the interposition of the son, despite the subsequent death of the latter. (On the other hand, had the father died at home, in fairness the will would have regained its validity[c]).

[c] So *Dig.* XLIX. XV. 22, § 4; *Dig.* XXVIII. iii. 15 and 12.

27 And, to bring to an end this discussion of postliminy, we should know that just as this right is ours in regard to things recovered from the enemy, just so in turn it applies to them in regard to things recovered from us. For the things which we capture from the enemy become ours on no different terms than they acquire the things which they capture from our people. So said Aretinus,[d] citing Hostiensis and de Ancharano. Thus also Albericus.[e]

[d] *On Dig.* XXVIII. i. 13, col. 2, at end.

[e] *On Code* I. i. 1, col. 6, words *ex praedictis satis patet.*

28 Accordingly the enemy will recover ownership not only of land or other possessions lost in war with us, but also of anything that they took from us, if we regain it, and it subsequently comes back into their

hands. And the logic of this is manifest. For since these things belonged to the enemy by the law of war quite as much as if they had secured them by contract,[a] they gain ownership through postliminy, just as we should. There is, however, this reservation—unless at the conclusion of hostilities it is provided in the articles of peace that captives be returned. In this case the latter remain[1] free to the extent that, if on renewal of war they are again captured, they do not revert to the former owner nor to the former enslavement and servitude, but become the property of the captor.[b]

[a] *Dig.* XLI. i. 5, at end, and 6; *Dig.* XLIX. xv. 12, near the beginning.

[b] See sole reference in *Dig.* XLIX. xv. 28, at end.

From this it seems to me that we should infer that if (by terms of a treaty such as the French made with the Spanish [52] and the Emperor in the year 1544 under the name of a peace) it is stipulated that confiscated property be restored to exiles and rebels: supposing war thereafter to be renewed (as happened in the seventh year after the above-mentioned peace), surely that earlier rebellion will create no prejudice, nor, with it as a pretext, will that same property be forfeited to the fiscus or to the parties to whom it had been given.

I add, further, that if in the time intervening between the peace and the subsequent war, those rebels—I choose to refer to them thus inexactly; for those are no longer rebels who have been pardoned, even though they have not returned home—if, I say, these rebels have in the meantime acquired anything (suppose, for example, that one of them loses his wife, whose dower in conformity with the statutes falls to the husband), such acquisitions are not revocable. For it cannot be said that a person is cut off from the benefit of the statutes of his country who has obtained full pardon for his wrongdoing. Consequently, if he engages in a new rebellion, on this new provocation his acquisitions escheat to the fiscus, and not to the agnates of the deceased wife. At Milan I heard an argument on this point against Bernardus de Comite.[c]

[c] See *ibid.*

However, I should judge otherwise in case a like situation arose under the compact made in the year 1555, which was called the Five Years' Truce, though it lasted little more than five months. For, by the terms of this pact, only the revenue and income from their property was allowed the exiles—which was rather a reprieve than a forgiveness of wrongdoing and reinstatement. For, after a reprieve expires, we fall back again into the prior status.

Baldus[d] takes up the question whether a man who rebels against his country forfeits its privileges; and he says that we must determine whether he was a rebel at the exact time his wife died in order to know whether he is entitled to succeed to her property and to acquire the dower by virtue of a statute. See his fuller statement.[e]

[d] *Consilia*, III. 96 (*Proponitur quod consuetudo civitatis Ast.*).

[e] *Ibid.*

[1] [For *remanet* read *remanent*.—Tr.]

[52r]

HERE BEGINS
THE FOURTH PART OF THE WORK

# CHAPTER I

## WHETHER AMONG CHRISTIANS PRISONERS OF WAR BECOME SLAVES

## SYNOPSIS

1 Whether Christians captured by Christians are made slaves.
2 Captives in a war declared by the Pope or Emperor become slaves of the captors —a rule not enforced.
3 Christians are mutually brothers.

But that we should now return, as it were by postliminy, to the discussion begun[1] regarding enslavement, I remarked above that in the wars which are waged among Christians the laws of postliminy have
1 little application, my intention being that we should raise the question whether, among Christians, captured persons become slaves of the captors. For in case they were to be made slaves, these laws would still be very much in point.

And as I have already mentioned above, they do become slaves, according to Innocent[a] and Bartolus[b] (but both are thinking of a war declared by the Emperor or the Pope). This accords also with the view of Baldus[c] and Giovanni d'Andrea,[d] who introduces a question regarding Enrico, son of the Emperor Frederick, who was captured by the people of Bologna, and died among them, after making a will there, which will, he says, was void. [53] Such too is the verdict of Aretinus,[e] who declared, however, that regard must be had for custom. There is support also in the statement of Baldus[f] that such prisoners are in the category of cattle or other movables, because they are no longer persons, but things. And this was the view of Calderinus.[g]

2 But, even in regard to a war declared by the Emperor, the other view was held by Saliceto,[h] and it accords with the idea of Bartolus.[i] This has become the rule; for we have very often known such prisoners to remain free persons. But they had imposed upon them the burden of a ransom to the extent of their ability, or in a sum agreed upon, being held meanwhile by the captors as security[j] (see also Aretinus[k]). And in case the prisoners are unwilling to ransom themselves, they can be compelled to do so. This rule the soldiers enforce even by torture, so Saliceto[l] reports.

And in such plight the prisoner will find no help in the edict *De eo quod metus causa*, as Saliceto there[m] says, because this edict does not apply to an action in arms and pertaining to regular warfare (and to hold otherwise would be to extend wars indefinitely, and never to get clear of their occasion. Hence Albericus[n] also stated that a person justly

[1] [For *ceptam* read *coeptam*.—Tr.]

[a] *Decretals*, II. xxiv. 29.
[b] *On Dig.* XXVIII. i. 13; more clearly *On Dig.* XLIX. xv. 24, last col., words *tertio modo*.
[c] *On Code* VII. xiv. 4.
[d] *Addit. to Durandus, De Instr. Edi.*, § *Compendiose*, ¶ 15.
[e] *On Dig.* XXVIII. i. 13, col. 2.
[f] *Consilia*, II. 358.
[g] *Consilia*, I, *De Treuga et Pace*, col. 3, words *et dicit Innocentius*.
[h] *On Code* VIII. l. 2.
[i] *On Dig.* XLIX. xv. 24, last words.
[j] *See Code*, VIII. l. 6, 8, and 20.
[k] *On Dig.* XXVIII. i. 13.
[l] *On Code* VIII. l. 2.
[m] *Ibid.*
[n] *On Dig.* IV. ii. 22.

imprisoned is legally under obligation to the person who imprisons). And Baldus,[a] too, declared that the fear in this case is inherent in the fact of victory, and, therefore, it is lawful to utilize it.

[a] *On Code* VII. v.

As for my statement that this has become current practice, justification for this procedure is found also in the law. For *Digest*, XLIX. xv. 21, § 1, states that, in civil dissensions, a man of the opposing party has not the status of an enemy, and for that reason he is not made a captive, nor does he need postliminy.

For Christians, no less than Romans, are brothers and fellow- 3
citizens to one another, as the Scriptures[b] show. For when the Israelites were carrying off a great number of captives from Jerusalem, a prophet met them, protesting vehemently against the enslavement, and demanded that all the prisoners be released; for, as he said, the fierce wrath of the Lord was upon the captors. Being brothers, therefore, and not enemies, even though they go to war, Christians do not become slaves of the captors. See, however, what I have said in earlier chapters.[c]

[b] *2 Chronicles*, xxviii [9 ff.].

[c] Pt. II, chap. xi; Pt. II, chap. xii, no. 1.

## CHAPTER II

### THE PROCEDURE FOR VICTORS WHO HAVE A DISPUTE REGARDING A PRISONER

[53']

### SYNOPSIS

1 Whether comrades-in-arms may take prisoners away from one another:
2 And what with regard to other plunder taken from the enemy?
3 He who takes away plunder from a comrade-in-arms is liable for it, even though he no longer possesses it.

But to return at length to the actual subject of war, inasmuch as it has already been stated that prisoners do not become the property of the captors until they have been brought within the latter's lines, the question is raised whether it is permissible in the interim for a 1
comrade-in-arms to take a prisoner by force from the hands of his captor. This often occurs both in battle and in the plundering of 2
cities; for the soldiers fight among themselves for the loot and the prisoners, wresting the same from one another.

And although I did state that things captured do not become the 3
property of the captors until they have taken them to a secure place, I do not, however, for that reason hold that it is permissible for comrades-in-arms to contend with regard to these.[d] In fact it might be said that a spoiler of this type is guilty of theft or public outrage;[e] and,

[d] See *Dig.* XLI. i. 5, § 1; *Inst.* II. i, § 13.

[e] *Dig.* XLI. i. 44 at end, and 55 at end.

further, there will be an inherent flaw affecting also the claim of the person to whom the thing in question may have been transferred. So *Digest*, XLIII. xxix. 3, § 6 ('if, though informed, he retains him, he is not guiltless of intentional wrong').

The second captor will still be liable, even though he does not keep the prisoner, but allows him to go.[a] And not only will he be liable though he no longer with intentional wrong retains the prisoner, but also if he releases him by order of the general—assuming, however, that something has accrued to him personally.[b] And if he disposes of the prisoner dishonestly, he will then be liable in full and for all claims; so the glossator and the Doctors.[c] See a fuller discussion of this topic below.[d]

[a] *Dig.* VI. i. 17, at the beginning.

[b] *Dig.* VI. i. 15, § 1.

[c] *Ibid.*

[d] Chap. vii, *passim.*

[54]

## CHAPTER III

### WHETHER PRISONERS MAY BE TRANSFERRED[1] OR SOLD

### SYNOPSIS

1 Whether a prisoner may be transferred or sold to another person.
2 Whether the claim of ransom for a captive may be transferred to another.
3 Whether the person who takes over a transferred claim may fix the ransom at his own figure.
4 Any one may transfer his rights.
5 Whether the privilege of fixing the sum may be transferred. So No. 7.
6 In these days ransom takes the place of enslavement.
[7 See No. 5 above.—Tr.]

1 Another question also arises. In battle it often happens that very distinguished prisoners taken from the enemy fall into the hands of the common soldiers, who sell them as they can, or according to agreement, and the purchasers later exact from these prisoners an immense amount of ransom, even up to many thousands of crowns—though they bought 2 them for a few hundreds. We ask whether this is legitimate business; also, whether it is permissible to exact from a prisoner a larger ransom than the price at which he was sold.

3 And in support of the view that it is not permissible, and that such contracts do not hold, *Code*, I. iv. 1 (according to one interpretation) used to be cited; see also the gloss there. And there seems a clearer passage in *Digest*, XLIX. xv. 19, § 9, where it is stated that it is not permissible to exact more from a ransomed person than the price paid for his ransom—which is listed as unique by Franciscus Cremensis,[e]

[e] *Singularia*, 166.

[1] [*cędi*, i.e. *cedi*.—Tr.]

though he quotes, not[1] the paragraph here cited, but *Code*, VIII. l. 1 and 20, and Felinus,[a] too, touches this point.

[a] *On Decretals* V. vi. 11, no. 3.

It is argued, in the third place, that a free body is not subject to sale.[b] Therefore, since (as I have already said) these captives do not become slaves, it follows that they may not be disposed of by sale.

[b] *Dig.* XVIII. i. 70; *Dig.* XLV. i. 103.

In the fourth place, there is support for this view in logic. For the captor has already shown himself content with the price which he accepted, hence the captive in question (like a slave with conditional freedom) may not be bound to harder conditions nor put under a handicap.[c]

[c] *Code.* VII. ii. 13; *Dig.* XL. vii. 9, at the beginning, and 29; *Dig.* XL. v. 24, § 21, near middle.

In favour of the other view is the fact that a person may sell a 4
claim or transfer it in any way he pleases. Now it was the right of the original holder to fix a ransom according to his judgement (for this is the law of war, which has displaced enslavement). Hence the party 5
taking over the claim will have the same power (for also the right of fixing terms can be transferred, according to Baldus.[d] And although Alexander,[e] following Imolensis, is in doubt regarding this ruling of Baldus, he yet does not venture to discard it).

[d] *On Code* VI. xlii. 7, last col., § *pone testator*; and *On Code* IV. xxxviii. 15, qu. 5, where also Saliceto.

[e] *On Dig.* XXX. lxxv.

And it seems that this principle should be insisted upon the more strongly in the present case, in view of the fact that the fixing of the estimate is not fully in the hands of the original holder. For if he fixes an unjust price and demands an unreasonable ransom, he will be taken in hand by the general, as Saliceto[f] pointed out. The same, then, will be the case of the party taking over the claim.

[f] *On Code* VIII. l. 2.

Note, too, that (as above indicated) ransom has displaced enslave- 6
ment. Accordingly, there should be an extension of the same power and right; and such slaves without doubt were negotiable.

The uncertainty, however, turns on this, whether [**54′**] the right 7
of price-fixing is transferable. Bartolus[g] declared that it is not, citing *Digest*, XL. v. 24 and 15. And Alciati[h] holds for[2] the negative, saying that this sort of traffic is little short of the sale of free men, and that it is subversive of good morals. Ripa,[i] too, treats the same problem, stating that a right may be transferred, but that it should be done without hurt to the prisoner. Hence, says he, the bond entered into with the original holder may not be raised; and the prisoner may not be burdened more than he would have been by the original holder. For ransom ought to be merciful. So Ripa.

[g] *On Dig.* XLV. i. 76.

[h] *On Code* II. iii. 6, car. 1.

[i] *On Dig.* XX. i. 6.

However, I have known prominent men in the army not to keep clear of such business, and to receive ransoms in a high figure, even up to fifty thousand crowns, though the prisoner had been sold for hardly five hundred or a thousand. And so I presume that it would be very difficult to protect a prisoner from the operation of camp usage, though I believe the above negative position is the more righteous and just.

[1] [For *not.* read *non.*—Tr.] [2] [For *in ter.* read *inter*—Tr.]

## CHAPTER IV

### WHETHER THE AMOUNT OF RANSOM MAY BE RAISED

### SYNOPSIS

1 The amount of ransom, once fixed, cannot be raised.

1 We ask, also, whether it is allowable to change and increase the amount of ransom, after it has once been determined and agreed upon with the prisoner—let us say, because of fuller information as to his quality, nobility, and wealth. And Guy de la Pape[a] declared that in the court to which he refers it was ruled that the practice is not permissible.

This is a reasonable view; for the captor is to blame for not making a better investigation. But in practice the rule is little observed, because of the lax standards in the army. For the arguments, see de la Pape.

[a] *Decisiones*, 113 (*In facto guerrarum*).

## CHAPTER V

### WHETHER IT IS PERMISSIBLE FOR PROVINCIALS TO FIGHT WITH THE ENEMY

### SYNOPSIS

1 Whether provincials may lawfully take arms against the soldiers of the enemy.
2 Rustics most harsh to the soldiery.
3 He who has been released from the oath may not serve as a soldier.
4 It is permissible to resist force by force.
5 Vengeance is not permissible.
6 Those who have not taken oath may not fight. [55]
7 Justice of the unjust.
8 Under orders of the general it is lawful for provincials to fight.
9 Those who fight without orders are guilty of the blood shed.

1 From what has been said above another question arises which is rather unusual. It has been stated that it is permissible for soldiers to plunder even the provincials of the enemy. Is it ever permissible for the provincials, in turn, to take soldiers captive, and, as the saying is, to give tit for tat?

2 This happens not infrequently; for often, when out plundering, soldiers fall into the hands of the rustics, who at times handle them very roughly.

3 And we may appeal to Cicero as an authority. For he relates[b] that

[b] *On Duties* [I. 36].[1]

[1] [This passage is bracketed by modern editors.—Tr.]

when Popilius for certain reasons had mustered out a legion in which the son of Cato was serving, and the latter because of his liking for war had remained with the army, Cato wrote to Popilius that if he allowed the son to remain there, he should cause him to take a second military oath, because, having lost his previous right, he could not now lawfully fight against the enemy. And he warned his son not to engage in battle before renewing the oath; for he said that it was not right for him, not being a soldier, to take part in battle with the enemy. So Cicero. Hence we find generals highly indignant when they hear that provincials have ventured some attack upon their soldiers, though they are little concerned, or not at all, at the infliction of any amount of evil upon the provincials by their troops.

But this does not accord with natural fairness; for why should I regard you as an enemy, and you not reciprocate? And such procedure seems to be allowed even by divine justice, according to the word: 'Whatsoever ye would that men should do to you, do ye even so to them'.

At this point I do not mean to bring into question my previous statement that if a war is unjust, not even defence is permissible. I 4
merely ask this: what is permissible for provincials? And I judge that they may resist force with force, but may not take vengeance, nor be the 5
aggressors. Even in defence I believe that due restraint is required.[a]

Otherwise men who have not taken the service oath may not fight.[b] 6
For the principle that hostile action is to be repaid to the enemy (aside 7
from necessary defensive operations) is the justice of the unjust.[c] And it suffices that non-combatants be defended by the soldiers of their own party, without themselves taking arms.[d] [55′]

But if a ruler were to order provincials to make an attack upon 8
this kind of bandits (not to say enemies) it would be permissible to obey, according to *Decretum*, II. xxiii. 4. 36 and what I have stated in a previous passage.[e]

But if they so act at their own charges, they become guilty of 9
crime[f]. By all means, therefore, provincials should beware of such wrongdoing. (This seems to conflict with what I have said above,[g] citing Angelus;[h] but I think that that earlier statement should be interpreted in the light of the present distinction.)

[a] See *Dig.* I. i. 3, with comments thereon.
[b] See gloss on *Decretum* II. xxiii. 1, 4, word *princeps*; and on *Decretum* II. xxiii. 5, 41.
[c] See *Decretum*, II. xxiii. 3, 1.
[d] According to *Decretum*, II. xxiii. 3. 3.
[e] Pt. II, chap. xi.
[f] See *Decretum*, II. xxiii. 5. 13 and 15; and *Decretum*, II. xxiii. 8, 4.
[g] Pt. II, chap. xviii, no. 10.
[h] *On Dig.* VIII. iii. 7.

## CHAPTER VI

### WHETHER IT IS PERMISSIBLE TO VISIT THE TERRITORY OF THE ENEMY

### SYNOPSIS

1 For good reason it is permissible to visit the enemy's territory.
2 However, this normally is among the things not allowed.
3 A lord may forbid his subjects to visit the territory of the enemy.
4 A subject may not be prevented from going where he wills.

1 INCIDENTALLY I raise the further question whether provincials, without offence to their lords, may visit the territory of the enemy or send letters or messengers thereto. And d'Isernia and de Afflictis[a] judge that though such action may for certain reasons be allowed (e.g. to consult a very skilful lawyer or physician, or even to visit a friend or
2 relative, or to collect from a debtor money that is due), yet, in view of the fact that the act belongs to the category of things forbidden[b], it will be necessary that a legitimate cause for going be demonstrated, the offender meanwhile being kept in confinement. Provincials, therefore, should be wary of taking risks.

3 Hence, it is less surprising that Baldus[c] says that a lord at war may forbid his subjects to visit the territory of the enemy, in order that all suspicion and chance of treachery be eliminated—although in other
4 respects they are independent and free persons (albeit subjects), and may not be restrained from trade and travel, except for due cause.

[a] *On Feuds* II. xxiv, § 5; no. 25 of the latter.

[b] *Dig.* XLVIII. iv. 1 and 2.

[c] *Consilia*, I. 483 (*Mag. dominus Nannus*), no. 5.

[56]

## CHAPTER VII

### WHETHER A PRISONER MAY BE TAKEN A SECOND TIME

### SYNOPSIS

1 Whether a prisoner may be taken a second time by another of the same party.
2[1] Whether a man becomes a prisoner who has given his sword or helmet in token of surrender.
3[1] Whether a prisoner on the field or in battle, if put upon his honour, may lawfully rejoin his friends.
4 Prisoners so named from capturing (*capere*).
5 A pledge constrains as much as a prison.
6 Ransom replaces enslavement.
7 Usage has established the principle that a prisoner, put upon his honour, cannot be taken by any one else.
8 Ransom may be multiplied, according to Baldus.
9 Refutation of Baldus' view.

1 I STATED above that it is not permissible for victors to deprive one another of prisoners. This has a bearing upon another question. In

[1] [Numbers 2 and 3 should be transposed.—TR.]

battle a soldier captures one of the enemy, and while he is in pursuit of others, a comrade-in-arms makes the same man prisoner. We ask: To which does the captive belong?

Here I recognized a distinction: (1) the man was put upon his honour, 2 and then, if his party wins, and retakes him, it is lawful for him to remain with them, even despite that pledge of his; (2) it was further agreed that he should not escape, even though his friends should prevail, and then it will not be permissible for him to break his promise, even though they win. So Saliceto.[a]

[a] *On Code* VIII. I. 2, penult. col., words *aut dixit.*

The following case developed: A prisoner, in token of surrender, 3 had given his sword to one of our soldiers, promising not to escape, but remained armed upon his horse, carrying a mace. A little later he fell in the way of another of our men on horseback, who took away his mace, and was leading along the prisoner with bridle-reins hanging from the horse's neck. They now encountered the enemy, who made a victorious assault, and scattered our whole cavalry division far and wide; whereupon the prisoner's horse, unchecked by bridle, of its own accord galloped after our men in their retreat until they met our infantry, who checked the flight of our cavalry, drove back the enemy, and seized the prisoner, whom the horse had brought along of its own accord. Query: To whom did the prisoner really belong—to the first man, to whom he had surrendered his sword and given his word; or to the second, who had taken away his mace and deprived him of the bridle of his horse; or to the infantryman, who in the third instance had captured him riding at random?

My opinion was that a verdict should be rendered in favour of the infantryman. For through the victorious onslaught of his friends (a fact that concerned the men who took him in the first and second [56′] instances) the prisoner had regained his former liberty.[b] For what is left to its natural free state is not regarded as being owned;[c] and there is support also in the statement of Saliceto above quoted.[d] The prisoner, then, as I have said, will belong to the infantryman;[e] for what belongs to no one becomes the property of the first taker.

[b] See *Dig.* XLI. i. 3 (at end) and 44 (at the beginning); *Inst.* II. i, § 12.
[c] *Dig.* XLI. ii. 3, § 14.
[d] *On Code* VIII. l. 2.
[e] According to *Inst.* II. i, §§ 12 and 17.

As to the general question, however, we need to proceed warily, because Baldus[f] appears to hold the affirmative view. For although my copy of his work (and others which I have consulted) is full of errors, yet, so far as can be determined, he supposes the case of a prisoner who was taken by several persons at different times in the same battle, and asks what should be the decision.

[f] *On Code* VIII. xlvii. 7.

And in regard to this nice question, as he calls it, he makes a distinction according as the original captor actually kept hold of the prisoner or put him upon his honour. In the first case, the man is truly and entirely the property of the first taker, who was guarding him; for, 4 says he, captives are so called from 'capture', just as chattels (*mancipia*)

are so named because they are 'taken by hand' (*manu capere*). But in case the prisoner was not guarded, but put upon parole, his word and promise are disregarded if he is taken by another's soldierly courage and carried off.

And in this second case he again makes a subdivision: (1) either the second captor, too, left the man on parole; and then[1] out of deference to those who had first taken the prisoner, the second captor loses his claim, and the man remains the prisoner of the first takers; or (2) the first takers rescued the man from the hands of the second captor, as we often see done among comrades-in-arms; and then also it must be ruled that the man remains the prisoner of these first takers. For, says Baldus,[a] a person is not counted captured, unless he remains captured.

[a] *Dig.* XLI. i. 55; *Code*, VIII. xl. 13.

And though *Digest*, XLI. i. 55, seems to belie this in saying that action may be brought against a person who had released or appropriated a boar that has fallen into my snare, the difficulty is solved, however, says Baldus, in that the case of a beast (which, immediately upon capture, becomes the property of the taker) is different from that of these prisoners, over whom ownership is not acquired, unless they are such as become slaves upon capture—as when the Emperor or the Pope (he says) has declared war upon those who rebel against them.

He holds, however, that in cases where the first taker rescues a prisoner by force from the hand of the second, action *in factum ad interesse* may be instituted against him,[b] just as partner is liable to partner for loss incurred.[c] Thus the soldier will be liable to his comrade-in-arms. This he said is true of the law of war and limited by custom, which should be followed when it is divergent.

[b] According to *Dig.* XLI. i. 55.
[c] *Dig.* XVII. ii. 52, § 3.

Thus Baldus held; but, though his authority is weighty, it seems to me that we should hold without qualification that the above prisoner, whether [57] led about by hand or put upon his honour, may not be taken by another of the same party.

For in case he becomes a slave, he is no longer free, but the property of the first taker, and cannot pass out of the power of the latter, unless he is recovered by the soldierly courage of his own partisans, or at least returns to them through postliminy.[d] (For whatever I have captured continues to be mine so long as it is kept in my custody. And the man who is oath-bound is kept in my custody no less than one retained by hand or chain, because by my intent and his pledge I retain possession of him—in the same way that I do not lose possession of a slave at the times when he is not with me.[e])

[d] *Dig.* XLI. i. 3, at the beginning and throughout.
[e] *Dig.* XLI. ii. 44.

And even if he does not become a slave of the captor, still we must reckon with the right of ransom and bonding, which replaces enslave-

[1] [Omitting the following *aut*, which seems to be unnecessarily repeated in the text; or there may be an even more extensive corruption of the text at this point.—Tr.]

ment; and the decision here should be reached according to the same rule.[a]

[a] Cf. *Dig.* II. xi. 10, § 2; *Dig.* XLVII. iv. 1, § 10.

And I see that this is the view supported by custom and practice. 7 For as soon as any one has surrendered, and in token thereof yields up and passes over his sword or any other kind of equipment, he comes in such wise into the power of the captor that no other of that party can acquire a claim to him, unless it chances that he has meanwhile been rescued by his friends. And the commanding general ought to insist upon this, lest quarrels arise among his soldiers, and lest those who are taking prisoners be obliged to quit fighting.

[b] On the same law, col. 2, words *quaero quidam sunt capti*.

I think that Baldus[b] is even farther astray when he makes the following distinction: (1) the man captured becomes the slave of the captor; and then he cannot be taken by another of that party, even though merely put upon his honour; for he cannot be wholly the slave of each of two people;[c] (2) he does not become a slave, but is put under a bond to pay ransom. And as that process may be repeated, so capture 8 too may be repeated. Hence a person may be prisoner in full not merely to one captor or to two, but even to many; just as a vassal may be vassal to many, and a freedman may be a freedman to many.

[c] *Dig.* XIII. vi. 5, § 15.

But even under this second head I think the verdict should be 9 negative, in view of what I have said above. And as a matter of fact, that reasoning of Baldus would apply as well to a person who is led about after capture as to one who has been put upon his honour. For, since the act may be repeated, I do you no wrong, if I too make captive and lay hands upon a prisoner you are leading, inasmuch as he can render satisfaction to both of us. But this Baldus himself denies. It would follow, further, that when a person has ransomed himself on a fair basis or at the figure demanded by the first taker, he would proceed in the same way with the second and the third, and so on, and there would be a series without end.

But, as I have shown, the opposite practice is observed, namely that the first taker, against all others, has an exclusive right to the prisoner. And this is fairer, since (as I have said) ransom has taken the place of enslavement, and the prisoner could have become the slave of one only.

[57]

# CHAPTER VIII

## WHETHER A PRISONER SHOULD KEEP FAITH, IF ALLOWED TO DEPART UNDER PROMISE TO RETURN

## SYNOPSIS


1 Whether a prisoner, released under promise to return, is bound to come back.
2 A person captured by brigands is not bound to keep a promise.
3 An oath should be kept both by right of law and the usage of war.
4 Whether an oath should be kept, if fear of death or torture is brought to bear. Refutation of those who uphold the negative.
5 Whether a prisoner who has promised to return to the custody of the enemy should keep his promise, in case his sovereign orders otherwise.
6 Refutation of the glossator and Doctors on *Digest*, II. xiv. 5 to the effect that a commanding general should keep faith with the enemy, but that the common soldier need not.
7 Agreements prejudicial to the public welfare are not to be kept.
8 Agreements conflicting with an earlier oath are not binding.
9 In the courts, fairness should be carefully studied.
10 Military cases should be decided on the basis of merit and justice.
11 The reward of success belongs to the owner of a horse loaned for another's use, and not to the rider.
12 Whether a person loaning a horse to a soldier is a sharer in the gain accruing from the expedition.
13 Agreement or clubbing among the soldiers regarding plunder taken from the enemy is permissible.
14 If a consideration becomes no consideration, payment is recovered.
15 Whether a person who takes a monastery is regarded as having taken also the individual places therein and all the people there sheltered.
16 Container and contained are in the same category.
17 A wild animal that is wounded does not become the property of the person who inflicts the wound.
18 A thing cannot be acquired by intent if it is not[1] apprehended by some corporeal means.
19 He who possesses a house does not possess all that is therein.
20 When sight of a thing is sufficient to establish possession.
21 Holy places should be immune even when the sack of a city is permitted.
22 The Goths spared churches in the sack of cities.
23 The sacking of a city is not permissible, unless the whole people has sinned.


BALDUS[a] also raises the question whether a prisoner, allowed to go
1 under promise to return, is bound to come back. And he says that in case he is the prisoner of a public enemy, he need not keep the promise. Therefore, such a person is not bound to return, but he may do so if he chooses.

[a] *On Code* VIII. xlvii. 7, col. 3 words *quaero an isti*.

If Baldus is thinking [58] of enemies in the sense of brigands (my
2 copy of his work being full of errors), I believe that his statement is

[1] [Inserting *non* after *ministerio*. See the text under this number.—TR.]

correct, in view of the gloss on *Digest*, III. v. 20, near the beginning (see also the Doctors there), where Angelus says that a prisoner, thus set free, acts wisely if he does not return. For he had not been lawfully captured, nor yet by real enemies; hence a ransom is not owed to his captors, even though it be promised. So say Angelus[a] and Bartolus.[b]

But if we are thinking of enemies in the strict sense of the term,[c] surely we have in common with them rights of enslavement and postliminy, and they with us.[d] And these must be observed. And my verdict is the same regarding war among Christians, even though the prisoners then do not become slaves. For a person is bound both to return, if he has given his promise, and also to pay a ransom, if he has so agreed—whatever Baldus may intend in the passage cited.[e]

And there is no difficulty with the gloss[f] which he cites. For it has to do with a person who, if he returns, unjustly incurs danger to his civil rights and his life; and in such a case a man is not bound to return, even though he has taken an oath.[g] The case is different when it is a question of danger to money and purse.

Baldus again[h] treats this same question, and reaches the conclusion that faith need not be kept with brigands, even though a promise has been given and an oath taken. But if it be a regular war, there both capture and contract are lawful; and an oath must be kept, as well from 3 the point of view of law, as from that of the usage of war. He also concludes there that a person who has been allowed to depart on parole or through the substitution of hostages is not counted as released—which makes for the view above expressed.

However, such hardship might be impending (e.g. of having to 4 run the risk of losing life itself) that it would become permissible to break a pledge; for it is allowable even by deceit to save one's life; so Baldus.[i] But I question whether this last is sound and right; for even pagans, who lived by the light of nature alone, have declared for the principle that if, under stress of circumstances, individuals have made any promise to the enemy, faith must be kept on that point.

Cicero (whose view this is) adds further:[j] 'When captured by the Carthaginians in the First Punic War, Regulus had been sent to Rome to effect an exchange of prisoners, having previously taken an oath that he would come back; on his arrival, he first advised against exchanging the Carthaginian prisoners; and then, though his relatives and friends tried to detain him, he chose rather to return to torture than to break a pledge given to the enemy.' What then would become a Christian man who takes an oath, let others judge.

This question is treated also by Paris de Puteo,[k] who makes a distinction between a person taken in a duel and a person taken in war. The first case I pass over. But under the second head he says that a 5 promise must be kept, even though the sovereign himself orders other-

[a] On same law, no. 1.
[b] On same law, at end of Commentary.
[c] According to *Dig.* XLIX. xv. 24; *Dig.* L. xvi. 118.
[d] *Ibid.*
[e] Words *sed si non essent captivantes de numero soldalium.*
[f] On *Constitutions of Clement*, II. xi. 1.
[g] *Ibid.*, § *per violentiam.*
[h] *Consilia*, II. 358 (*Licet latrunculis*), cited above also.
[i] *Ibid.*
[j] [*On Duties*, I. 39].
[k] *De Duello, sive de re militari.*

wise. For, on the basis of the law of nations and of war, it is right that the regulations of war be observed; and a ruler who has undertaken a war thus obligates both himself and his subjects.[a] [58′]

Hence I hold that if a prisoner is put on parole, under pledge and promise not to escape and to return, he is bound to keep his promise and to pay a ransom, either fixed and determined, or even one to be settled by referees, if no other agreement is reached between the parties, as Baldus[b] says—and particularly in cases where, according to him, excessive cruelty is not in prospect.

And it is in the light of the above stated distinction that we should judge of the decision of Fulgosius (cited by Jason[c]) in an actual case touching a physician who was captured by Germans, and who, after arranging his bond and the price of his ransom at a thousand gold pieces, was dismissed on parole to go to Bologna to secure the funds. The decision was that he was not bound to return, or to pay the money. Now if those Germans were brigands and persons with whom there was no war, the verdict was sound; but otherwise (supposing them to have been bona fide enemies) the decision was given with an eye to the purse, and not to honesty and right.

6 And although the glossator and Doctors on *Digest* II. xiv. 5 and IV. iii. 1, § 3, declare that the commanding officer must keep faith, but that the case is different with the common soldier (which conflicts with Cicero's above quoted comment: 'If individuals, under stress of circumstances, have made a promise to the enemy, faith must be kept on that point'), I still think that a distinction may be drawn.

For (1) the soldier promised something to his own loss, and in 7 accordance with the law of war; then he should keep faith; or (2) he promised something to the disadvantage of the state without reference to the accustomed usage of war; then he will not be bound. For his obligation to the state will be stronger than to his personal word.

Accordingly, when the commanders of the French at the surrender of Carignano had exacted from Pirro Colonna and the German and Spanish troops (who after a long siege had been obliged to yield 8 that stronghold because of lack of food) a promise and perhaps an oath that during the whole continuance of that war they would not render service to the Emperor, although previously they were bound to this on the score of fidelity and the military oath; it was ruled that this second oath was not valid, because it was very much out of harmony with the practice of war,[d] and because the binding force of the earlier oath was superior to it.[e]

I was consulted about another question also, when I was at Brussels at the court of His Highness, the King of Spain. The commander of a troop of Spanish horse (whom they call 'captain'), just as the signal for battle was given, met one of the men of his troop on foot

[a] See his statement more at length, IX. iii, tit. *An captus in duello.*

[b] *Consilia*, II. 358, at end.

[c] *On Dig.* II. xiv. 5.

[d] See gloss on *Sext.* II. xi. 2, with comment by the Doctors there.

[e] *Decretals*, II. xxiv. 19; Felinus at length on *Decretals*, I. iii. 19, col. 5, ampl. 2.

and rather fully armed. And as the man complained that a few days before he had lost his horse in battle, and for that reason was not able to take part in the impending struggle, the captain ordered that he mount one of his horses and attend[1] him, as he was himself suffering from fever and could scarce keep his seat in the saddle. [59]

But, mounting the horse, the soldier turned off in another direction, and during the pursuit of the enemy he happened upon their commander, whom he captured and turned over to his own and the army's chief, receiving from the latter twenty thousand pieces of gold. The captain claimed that a part of the ransom money was owed to him, because the soldier had fought from his horse, and otherwise would not have taken part in the battle.

I argued that the captain's claim had the support of justice, which 9
in a law case is of first moment,[a] and a thing which the judge should
observe with the greatest care[b] (and this applies particularly among 10
soldiers, whose disputes are settled on the basis of merit and fairness).
From this point of view we are told that, beyond mere formal agreement, a person is bound to the extent of the moral claim of each party upon the other.[c] Hence also in such a case the judge will grant relief, even though a person is unable to bring action. Such claim to fairness is manifest in the present matter.[d]

[a] *Code*, III. i. 8.
[b] *Dig.* XI. vii. 14, § 13.
[c] *Dig.* XLIV. vii. 2, at end.
[d] *Dig.* XII. i. 32, where all comment.

Again, I said that it appeared that action might be based on the fact of the loan. For since I loaned the horse to you on condition that you follow me and that I be better attended and defended—a loan which I perhaps should not have made otherwise—if you secure any gain from my property, or on account of it, you should reimburse me.[e]

[e] *Dig.* XIII. vi. 13, § 1.

Further, I said that action could be based on implied contract; for the agreement that you follow me involves a legal obligation, as the jurisconsult says of a similar case in *Digest*, XIX. v. 15. Or action is brought even for wrong intent, as is also said there.

And especially close in its application to this case is the passage in *Digest*, XIX. v. 20, near the beginning, where it is stated that if I 11
entrust to you for trial some horses that are for sale, and, mounted upon these, you enter a race and win, you have won for me and not for yourself, and consequently you pay me what you gained by the transaction.

Now this soldier had secured the horse on the condition that he attend[2] the captain; hence in going off in another direction he was guilty of wrong intent. Accordingly, he has no claim upon the gain secured through the use of the horse, even though he was responsible for injury to the animal. So Bartolus;[f] and Baldus, too, comments to 12
this effect on that same passage. The captain also quoted army usage,

[f] *On Dig.* XIII. vi. 13, § 1, reading this paragraph in connexion with the opening words of the law.

[1] [For *committaretur* read *comitaretur*.—Tr.] [2] [For *cōmittaretur* read *comitaretur*.—Tr.]

in accordance with which a person who loans a horse is made a sharer in the gain that accrues.

On my departure from the court, this case was still undecided. Later I learned that judgement was given against the captain—whether justly or not, it is not now the time to consider. We must assume, however, that the person who acted as judge was moved by considerations of reason and law.

I raise a further question: Some comrades-in-arms made an agreement among themselves to share with one another whatever they
13 might acquire (this sort of compact being lawful[a]). Thus they took prisoner a certain provincial, who gave a bond, agreeing to pay two hundred crowns. One of the partners sold out his interest for cash at a lower rate to another of the comrades-in-arms. Later the commanding officer ordered that this prisoner be allowed [59′] to go scot-free.

[a] According to Baldus, *Consilia*, II. 358.

It is queried whether the soldier should be refunded the money by his comrade-in-arms. The verdict is that he should so recover, according to *Digest*, XIX. i. 50, where Bartolus comments. So Baldus,
14 on *Code* IV. xlviii. 6,[b] who says that if a consideration becomes no consideration, payment is reclaimed.

[b] Words *sed pone*.

15 Once again I query: A certain state was pillaged by permission of the commanding general. It happened that a standard-bearer entered a monastery with some of his comrades-in-arms, and plundered it with military licence. Now there was hidden in that monastery, in some apartment or bedroom, a certain noble; and, before this man could fall into the hands of the standard-bearer, or the latter could get into the room because the key was missing, he was taken prisoner by a captain, who also had entered the monastery, and with previous information regarding the presence of that noble from a servant of the latter.

The question is: To whom does the prisoner belong—to the standard-bearer or to the captain? And (disregarding any consideration of the immunity of the church, of which it would be vain to speak, in view of lax discipline and contempt for religion) it appeared that a verdict should be rendered in favour of the standard-bearer, who was first to enter the monastery, and to attempt to enter the room, and who already in intent had captured and secured possession of the prisoner therein confined. This is supported by *Digest*, IV. vi. 9, near the end ('for it makes no difference whether a person is confined by walls or by shackles'). So *Digest*, XLI. ii. 1, § 21 ('because it is not essential to take possession by bodily contact, for this can be accomplished even by sight and intent'); and there is a still stronger passage
16 under the same title.[c] Further, it makes for the case of the standard-bearer that, being in possession of the container, i.e. the monastery, he appears to be possessor also of the things contained therein.[d]

[c] Law 3, § 3.

[d] *Ibid.*, Law 3, § 13.

On *Digest* XLI. ii. 30, near the beginning (a passage, moreover,

which, on the face of it, strongly supports the other view; and it was for this same opposing view that judgement was rendered, on the basis of *Digest*, XLI. i. 5, near the beginning[a]) Paolo di Castro declares that 17 even in the case of a wild beast that has been wounded and pursued by the person who wounded it, many a chance may intervene to prevent its capture by the hunter. No wonder, then, that if another person 18 succeeds first in capturing it, it becomes the property of the latter.[b] Moreover, we cannot by intent acquire a thing which is neither seen with the eyes nor touched by the body.[c]

In regard to the citations in support of the first-mentioned view, rebuttal is offered. For *Digest*, IV. vi. 9 has to do with a person who is cornered and confined, not with a person in hiding; and *Digest*, XLI. ii. 1, § 21, according to the view of Sabinus (which is generally accepted), looks to the contrary, as also does *Digest*, XLI. ii. 30. And while 19 what Paoli di Castro there[d] states may be true, namely that he who possesses a house is not thereby counted to possess the pillars and posts and tiles of the house, this remark of his has a different bearing;[e] but none the less are the words and sense of *Digest*, XLI. ii. 30 inherently valid, to the effect [60] that he who possesses a house or a ship does not thereby possess all that therein is.

Yet Alexander, on *Digest*, XLII. ii. 3,[f] following Bartolus there, interprets that passage otherwise; and he is followed by Jason,[g] who quotes *Digest*, XXIII. iii. 9, § 2,[h] which had previously been cited by Baldus on this point.[i] But in my judgement we may solve as follows—though Jason there boggles at such an explanation: (1) there is consent on the part of the person who was in possession and gives up a thing; and then inspection and actual sight are sufficient, and there is no need 20 of actual corporeal contact:[j] (2) consent is lacking on the part of the person in possession, or else the thing was possessed by no one; then real and actual touch is required. So Bartolus.[k] Jason[l] offers a further explanation that in the case of things requiring actual seizure, mere seizing of the container is not sufficient.

Furthermore, the above-mentioned captain cited as in his favour the military usage whereby, though a soldier entering a private house is allowed to have acquired everything present therein, the rule is different in the case of churches and monasteries—perhaps because of the many different domiciles which they contain. Here, however, is a difference of circumstance rather than of equity.

And it would be more just and righteous by far to refrain alto- 21 gether from entering and plundering holy places. For sacrilege is committed as well by stealing secular things in a church as it is by appropriating holy things.[m]

For if the Goths, a barbarous and rude people—and infidels to 22 boot—gave orders at the capture and sack of Rome that no harm should

[a] Word *proinde*.

[b] *Dig.* XLI. ii. 30; *Dig.* XLI. i. 55, word *summam*; *Dig.* XLI. ii. 3, at the beginning.

[c] *Dig.* XLI. ii. 8.

[d] *On Dig.* XLI. ii. 30.

[e] See *Dig.* XLI. iii. 30.

[f] At the beginning, no. 27.

[g] *Ibid.*, no. 33.

[h] Words *quid enim interest.*

[i] *On Code* VI. ii. 11.

[j] *Dig.* XXIII. iii. 9, words *quid enim*; *Dig.* XVIII. i. 74.

[k] *On Dig.* XLI. ii. 1, at the beginning, 4th main question.

[l] *On Dig.* XLI. ii. 3, § 3, no. 4.

[m] *Decretum*, II. xii. 4. 21, 4 [II. xvii. 4. 21, 4], gloss.

be done to the church of St. Peter and St. Paul or to aught therein found (as St. Augustine[a] records), how much more ought Christian soldiers to be reverent and respectful in regard to things sacred? And how much more vigilant and watchful in this matter should commanders be—all the more so because this sort of plundering and sacking of cities is in large measure unwarranted?

[a] *On the City of God*, I. i, if I rightly recall.

23 For cities ought not to be plundered except for some great wrong and crime in which the whole population (or at any rate the greater part) has shared. And this fact must be emphasized in regard to those towns which the enemy take from us by surprise (sometimes even through the sloth and inattention of our own commanders and soldiers), supposing that we take them again by force from the enemy. For people of this sort cannot be called 'rebels', as Bartolus points out.[b]

[b] Tit. *Qui sint rebelles*, gloss on word *rebellando*, words *Domino quaedam sunt civitates*.

Commanders of armies, therefore, should beware lest,[1] in endeavouring to show favour to the soldiers and to secure their goodwill, they fall under the displeasure of God. Of this something had been said above in another place.

[1] [For *nedum* read *ne, dum*.—Tr.]

[60′]

HERE BEGINS
THE FIFTH PART OF THE WORK

# CHAPTER I

## ON TRUCES

## SYNOPSIS

1 *Treuga* ('truce') and *treugare* ('to make a truce') are foreign terms.
2 Truce; what it is.
3 Whether an army commander may lawfully make a truce.

TRUCES intervene in the course of war, being designated in these days as *treugae*. This word, however, is unusual, and not Latin at all. But the canon law uses it;[a] and the Archdeacon[b] employed not only the noun *treuga*, but also the verb *treugare*. Hence also he applied the
1 name *treugarius* to one who makes a truce.[c] Yet these are foreign expressions.

Further, I do not think that we can accept the distinction made by a gloss[d] that *treuga* is a truce for a long period, and *indutiae* a truce for a short time. For I have known *treuga* to be applied to a truce of short duration also; and in these days they so designate any sort of truce—just as the ancients applied the name *indutiae* to any kind whatsoever.

2 In the first place, I ask then: What is a truce? And *Digest*, XLIX. xv. 19, § 1, says that it is a cessation of hostilities for a brief period.

3 In the second place, I query whether it is permissible for the commander of an army to make a truce. And in case he is himself a sovereign, no one could doubt his right; moreover, if another has been put in command of an army by the sovereign, [61] Bartolus[e] declared that the former may make a truce, but not a peace.

But Paolo di Castro on the same passage says that the appointee has the right to do neither thing, unless he has been granted full jurisdiction. This is the opinion of the Doctors generally, though (with the tacit approval of Alexander)[f] Fulgosius there[g] adds the qualification: 'unless it be a truce for a short period'.

Thus we read that between Greek generals truces were often made by the commanders for two or three days in order to bury the slain. And here the opinion of Bartolus would hold, truces being made for a short period.[h]

Also in these wars of ours we are witnesses of the fact that in the year 1540 the Marquis del Vasto made a month's truce with the Comte d'Enghien, commander of the French. And again, Ferrante di Gonzaga made another truce, also for a month, with the Sieur de Brissac—

[a] Title and text of *Decretals*, I. xxxiv.
[b] *On Decretum* II. xxiv. 3, 25.
[c] *Ibid.*
[d] *On Dig.* II. xiv. 5.
[e] *On Dig.* II. xiv. 5.
[f] *Ibid.*
[g] *Ibid.*
[h] *Dig.* XLIX. xv. 19, § 1.

in the year 1553, unless I mistake. Possibly, however, these leaders had unusually full jurisdiction, in which case, as I have pointed out, they were within their rights; so Jason,[a] following others.

[a] *On Dig.* II. xiv. 5, last col., limit. 3.

## CHAPTER II

### WHETHER A TRUCE HAS MORE IN COMMON WITH WAR OR WITH PEACE

### SYNOPSIS

1 Whether a truce more nearly approximates peace or war.
2 Peace not the same as a truce.
3 Oblivion results from long lapse of time.
4 Tax receipts suffer from even a rumour of war.

I ASK next with what a truce has more in common—with peace 1
or with war? The Archdeacon[b] says that a truce is peace, following Hostiensis; and Panormitanus[c] declares that, when made for a considerable period, a truce may be called peace. This he applies[d] to a question regarding a person who hired a cavalry commander for the period of a war, or even until peace should come; and he queries whether the engagement is to be counted as terminated by a truce of this sort (a question argued at an earlier time by Giovanni d'Andrea), and concludes that it was so terminated; hence the employer was not responsible for wages during the time of the truce.

[b] *On Decretum* II. xxiv. 3. 25.
[c] *On Decretals* II. i. 13, no. 10.
[d] *Ibid.*

However, in a case where the contract ran 'until peace comes', I should myself incline to the view that the decision ought to be reversed. For peace and truce are not identical, as I shall shortly show; and the wording of contracts should be interpreted strictly and exactly, according to the rules in common use in this connexion.

Further, I should think that it ought to be determined whether the employer notified the officer the moment the truce was made, and dismissed him; or whether he retained him. For men are mustered out and dismissed, when their service as soldiers is no longer required.[e] [61']

[e] See *Dig.* XLIX. xvi. 13, § 3.

On the main question, it is customary to cite the passage in *Decretals*, II. i. 13, where it seems to be held that a truce is peace; for it is said there that he who has broken a truce has done violence to a peace pact. And this view is indicated also in *Decretum*, II. xxiv. 3, 25. Virgil,[f] too, speaks of a truce as peace when he says:

[f] [*Aeneid*, XI. 133].

> Twelve were the days agreed, and in the ensuing peace . . .

The contrary view is expressed by a gloss and the Doctors on *Decretals* II. i. 21.

I like better the statement of Petrus de Ancharano[a] to the effect that there are three things, no one of which is identical with another, 2 namely, war, truce, and peace. Felinus[b] goes deeply into this matter, reaching the conclusion that a truce is more nearly akin to war than to peace.

This I believe to be correct in the case of a genuine truce, i.e. (according to its definition—for which see *Digest*, XLIX. xv. 19, § 1) one which is made for a short period. But in regard to a truce of long duration (such as was made in the year 1538[1] at Nice, between the Emperor Charles and Francis, King of the French, for a period of ten years), I should fancy that this amounted to a peace, and that at its 3 expiration a new proclamation and declaration of war would be required. For after so great a lapse of time we assume that not only the parties to the war but also the provincials have forgotten it.[c]

(However, the contrary might be argued on the ground that not even in view of a long lapse of time is forgetfulness to be taken for granted when an offence is noteworthy and serious, according to a passage which is usually cited as unique in *Decretals*, V. xxxix. 32. But this refers simply to forgetting, and says nothing of ten years.)

Nor in the case of so long a truce should I think valid the state- 4 ment of de Ancharano[d] that in time of truce the same indulgence should be granted a tax-farmer on account of war as would be granted him in time of actual warfare. But the case would be otherwise, if the truce were of moderate length. (Here most aptly applies the remark of Cicero in his speech *De Imperio Cn. Pompei*.[e] 'In other matters', says he, 'when disaster arrives, then it is that loss is sustained; but in regard to the revenues, not merely the arrival of trouble, but even the fear of it, brings disaster'.) See also below.[f]

[a] *Consilium* 88, beginning: *Praemissa facti serie.*

[b] *On Decretals* II. i. 21.

[c] Cf. *Dig.* XLI. iii. 37, § 1.

[d] *Consilium* 88.

[e] [15].

[f] Pt. VI, chap. i, no. 15.

[1] [June 18. It guaranteed to each, for ten years, the possession of that property which he held at the time of the truce's going into effect.—Ed.]

## CHAPTER III

### ON VARIOUS QUESTIONS ARISING IN CONNEXION WITH TRUCES

### SYNOPSIS


1 Whether a truce should be kept with one who violates it.
2 The covenant-breaker should not have a status more favourable than that of one who observes it.
3 When equal wrongs are cancelled by retaliation.
4 Faith need not be kept with a covenant-breaker.
5 There should be no trifling in regard to covenants and pacts. [62]
6 Possession is acquired neither by intent alone nor by touch alone.
7 A few soldiers found in a place are not assumed to have acquired that place by right of war.
8 Whether a village is included when its state is captured in war.[1]
9 Actual fact is of more importance than legal considerations in questions having to do with acquisition by armed force.
10 Why possession rests more on the fact of touch than of intent.
11 An oath of allegiance does not entail transfer or acquisition of a thing.
12 Acknowledgement on the part of a vassal does not constitute possession for the lord.
13 Vassalage to another does not transfer possession with loss to a previous lord, if he too has possession.
14 Rights of lords not dependent upon subjects.
15 A lord does not lose possession of a subject of his who is held under restraint by another.
16 The inception of capture should be looked into.
17 If a person has been captured in time of peace, even through the pretended courtesy of another, who knew that war would be renewed, he cannot be regarded as lawfully captured.
18 Whether 'from' (*a*, *ab*) is used so as to include the terminus or not.
19 The exact time is regarded.
20 Absurdity is altogether to be avoided.
21 Whether a new declaration of war is required on the expiration of a truce.
22 Baldus inconsistent in his decisions.


I NOW ask whether, when a truce has been violated by one party, 1
it is permissible for the other party to do likewise. Vincent of Spain, an early Doctor, says that it is not permissible; and he is reported and followed by the Archdeacon.[a] The same position is taken by Giovanni d'Andrea and Antonio de Butrio,[b] the latter of whom Martinus Laudensis[c] cites in support of this view, without comment, as is his usual custom in treating such matters. On this side Alexander and Jason[d] range themselves.

This verdict would be on a stronger footing, if it were agreed in the terms of the compact not to break the truce, even in case of some new offence—a provision which I note was incorporated in that ten-year truce made at Nice. On this matter see Bartholomaeus Socinus,[e] who is cited by Corsetti,[f] [62′] the latter discussing the question in detail.

Otherwise, I have held for the contrary view, on the authority of

[a] *On Decretum* II. xxiv. 3. 25, no. 4.
[b] *On Decretals* II. xxiv. 29, el. 3. So Giovanni d'Andrea in addit. to Durandus, on rubr. *De Treuga et Pace*; and Antonio de Butrio, on *Decretals*, II. xxiv. 2.
[c] *De Confederatione et Pace*, etc., qu. 16.
[d] *On Code* II. iii. 21; and Jason, *Consilia*, II. 170.
[e] *Consilia*, II. 262.
[f] *De Privilegiis Pacis*, at the beginning no. 117.

[1] [But see text below under this number, and compare no. 15 there.—TR.]

Joannes of Imola,[a] who took that position—which is supported at greater length by Panormitanus[b] and the Archbishop of Florence.[c] And I regard
2 this view as particularly applicable in the case of long-continued truces (not to give a greater advantage to the faithless and the covenant-breaker than to the conscientious and the honourable; and because it would be a bad procedure in war if a person gave his attention to defence merely, while the other party was plundering right and left—especially so, if the enemy's country were very close). This Saliceto[d] weighs and accepts.

(However, the decision of Vincent might apply to a truce of a few hours, or perhaps days—but, even so, as a matter of courtesy rather than of actual right. Here the example set by Scipio Africanus the Elder fits admirably. For after the Carthaginians in time of truce had attacked a Roman fleet that had been demoralized by a severe storm, before the expiration of that same truce fortune threw into the hands of Africanus some ambassadors of the Carthaginians. Whereupon premising[2] that the Carthaginians had done violence not only to the integrity of the truce, but also to the law of nations itself, still he said that he would do nothing to the discredit of Roman institutions or his own character; and so he allowed the ambassadors to go free. So Livy.[e])

Moreover, the arguments in support of the other view are very weak. Thus, as for the statement of the Archdeacon that though you burn my house, I may not likewise burn yours, and though you are guilty of betrayal, I may not follow suit—these principles apply among
3 civilians, with whom crimes and wrongs are not cancelled by retaliation,[f] whereas in the above case there should be place for the rule[g] that
4 faith need not be kept with a covenant-breaker. For he who breaks the law appeals in vain to its protection; and we are told[h] that he who inflicts injury as a result of a newly arisen provocation is not counted guilty of breaking the peace.

A second suggestion, to the effect that the party that is injured can inflict punishment after the truce has run out, is neither honourable nor safe, especially if the truce be of long duration.

And Corneo[1] says that the rule of Vincent the Spaniard ought to be modified so as to apply to activity in general, and not merely to the activity pertaining to matters of war; otherwise, says he, it would be observed nowhere at all. It is fair, therefore, that he who wishes it observed towards himself should also himself observe it—and this rule applies among civilians too.

5 It is not seemly, either, to trifle with pacts and covenants, as did that Spartan (was it Cleomenes, or some other?) who, after arranging a truce for thirty days with the enemy, devastated the country of the

[a] *On Dig.* XLV. i. 96.[1]
[b] *On Decretals* I. xxxiv. 1.
[c] *Summa*, Pt. III, tit. IV, chap. ii, § 1, towards end.
[d] *On Code* VIII. l. 2, col. 2, words *si autem non tantum se defendit.*
[e] XXX [xxiv. 10 ff.].
[f] *Dig.* XLVIII. v. 2, § 5.
[g] *Code*, II. iii. 21; *Decretals*, II. xxiv. 2; *Sext*, V. xii, reg. 75.
[h] *Dig.* XLV. i. 96.[3]
[1] *Consilia*, II. 42, under no. 8.

[1] [For *quod* read *qui*.—Tr.]
[2] For *Praefetus* read *Praefatus*.—Tr.]
[3] [For *quod* read *qui*.—Tr.]

latter by night, alleging that the agreement covered the days, but not the nights. [63][a]

[a] [*Cf.* Cicero, *On Duties*, I. 33; Plutarch, *Apophthegmata Laconica*, p. 223 A ff.]

Here belongs a case that came under my observation. Arrangement for a truce had been perfected; and before the date of making it public, the general of one party was given the information, but the other was not. The terms provided that both parties refrain from warfare while the truce was on, with the understanding that things remain meanwhile in unchanged status, i.e. whatever they should possess and occupy at that time they should still possess and occupy. Now, the first-mentioned commander distributed many of his soldiers (even by twos and threes) in numerous villages and towns; and as these men were found therein at the moment the truce was announced, they claimed that these places belonged to them by right of war and of that agreement.

In point of law, however, this may not have been true; for perhaps it was not permissible to take advantage of such a provision. See what is said of the town official who had received private information that the price of wheat or even the exchange rate was to be lowered, and at the proper moment disposed of all his stock, as described by Bartolus.[b] Again, note what Bartolus[c] says in reference to a city prefect, all of whose debts it is customary for the Emperor to pay at his coronation; and the man, knowing that the next coronation is near, sets himself to piling up a huge debt. Bartolus there makes reference also to those who in war hasten to consummate deeds of wickedness in the anticipation of the early signing of peace.

[b] *On Dig.* I. iii. 29, and *Dig.* XIX. i. 39.

[c] *On Dig.* XLVII. iv. 1, at the beginning.

And, again, the presence of some few soldiers was not sufficient for the acquisition of those places. For possession is not acquired 6
either by intent alone or by contact alone.[d] Moreover, so few men 7
could not acquire those places, dispossessing the former owner and possessor.[e] And it might be said that the few soldiers, scattered through those places, were themselves held, rather than that they were holding something. So Bartolus[f] ruled in a similar case; and this matter I shall treat more fully later.

[d] *Dig.* XLI. ii. 3, at the beginning, and 8.

[e] So indicated by *Dig.* XLI. ii. 18, § 4.

[f] *On Dig.* XLIII. xxvi. 15, § 1.

I witnessed an argument regarding another case also. In this Piedmontese or Cisalpine home district of ours, the French were in possession of some strongly garrisoned places, among which were even metropolitan cities, such as Casale and Turin. Then, in accordance with a compact and truces often renewed, it was agreed that both parties should retain the same possessions as they had held in the war. But many villages and hamlets had taken orders from both parties during that time, and had supported both with service and contributions; moreover, many had received from leaders on both sides credentials (called 'safe-conducts') by which they were restored under their protection; and some of them had even taken an oath of allegiance to

8 both sides. Hence the question was raised: to which party did those hamlets and villages belong?

And that villages which are under protection belong to the protector seems the implication of a passage in *Digest*, L. i. 30; in fact, even that they belong to the one to which they are nearer might be argued from *Digest*, XLI. i. 56. [63′] Or, at any rate, since these places took orders[1] from both parties in the war, by the terms of the compact it might seem that they remained common property.[a]

9 It was my decision that, in acquisition which is based directly on the law of nations, the actual should be regarded rather than the technical; hence actual and firm seizure is required. So *Digest*, XLI. ii. 1, near the beginning, where all comment, particularly Jason, who 10 considers the question why possession is determined more by contact than by intent. There is additional support in the same law, § 1, with gloss,[b] and in *Digest*, IV. vi. 19, where it is stated that possession is chiefly a matter of actual fact. And further discussion may be found in *Digest*, XLI. ii. 3, near the beginning.

Therefore, to make it possible to say that those hamlets were acquired by the law of nations and of war (assuming also justice on the part of those who press the war—a point regarding which this is not the place to speak), real and actual seizure is required. And from the acquisition or occupation of one part, the acquisition of a remaining unoccupied part does not result.[c]

11 And, to pass to another point, possession is not secured to the enemy nor wrested from the lord through an oath of allegiance (so 12 Innocent,[d] who is followed by Baldus[e])—just as, through allegiance offered by a vassal, a direct right is not established for the person to whom the tender is made. So Odofredus,[f] who is followed by Baldus.[g] Compare also de Afflictis there,[h] and the comments of the canonists.[i] So, too, Aretinus.[j] (The glossator[k] ventures the stronger statement that even if a vassal surrenders a feudal holding, he does not impair the lord's legal right of possession. But this would hardly hold in a discussion about war; for there naturally fact is stressed. See also what the Doctors say on *Digest* XLI. ii. 21, § 3.)

13 Again, possession is not gained because of the above-mentioned payments and services, whether they were in goods or in person. For although from obedience to orders (particularly if they call for active service) there accrues a sort of acquisition of jurisdiction,[l] still, if the original lord meanwhile holds possession, his rights of ownership and possession are not interrupted. See *Digest*, XLI. ii. 32, § 1. (On that passage Bartolus notes an important distinction: (1) the person by whose instrumentality I have possession really and actually transfers possession to another, and then I lose it; (2) he makes a transfer by

[1] [For *paterent* probably *parerent* should be read; cf. no. 7.—Tr.

[a] According to *Dig.* XLIII. xvii. 3.

[b] Words *eam rem.*

[c] *Dig.* XLI. ii. 18, at end.

[d] *Decretals*, III. xxxvii. 2.

[e] *On Code* III. xxxiv. 2, no. 50.

[f] *On Code* II. iii. 20.

[g] *On Feuds* II. li. 1, no. 13.

[h] *Ibid.*, no. 59.

[i] *On Decretals* II. ii. 7 (so Panormitanus); and *On Decretals* II. xxiv. 22, following the text there, and *Decretals*, II. xiii. 12, el. 1.

[j] *Consilium* 14, col. 4.

[k] *On Dig.* VII. ix. 1, at end, and *Code*, VIII. vi. 1.

[l] According to Innocent on *Decretals* II. xiii. 12, reported and followed by Baldus on *Code* III. xxxiv. 2, no. 54.

legal fiction,[1] and then I do not.) Now if the first owner retains possession, it is impossible for another to have it. [64][a]

[a] Cf. *Dig.* XIII. vi. 5, § 15; *Dig.* XLI. ii. 3, § 5.

And this applies all the more, in view of the fact that the above-mentioned activities were of a promiscuous and general character, having to do with the persons of the townspeople themselves rather than with the towns proper; hence they do not necessarily involve occupation of the places. Accordingly, transfer of possession is not established through such activities, and there will be application for the statement of Innocent, quoted by Baldus on *Code* III. xxxiv. 2, no. 15, where he says that actions of a promiscuous, general, and irregular character do not establish possession.

[b] *On Code* VI. i. 1, col. 4.

There is further support in the statement of Baldus[b] that the 14
rights of lords are not affected by the seizure of subjects who are held against their will. On that ground he assumes that if any sub- 15
ject against his will is held by another, and the man meanwhile calls himself my subject and so comports himself to the best of his ability, I do not lose the right of possession which I exercise over him.[c] It is true that Baldus here is speaking of civil possession. But, in the case of this sort of seizure also, hamlets do not go with the cities. So Bartolus and others[d] state, and Baldus[e] also; compare too *Digest*, XLI. ii. 18, § 4.

[c] *Ibid.*, words *plus dico*.

[d] *On Dig.* XLI. ii. 3, at the beginning.

[e] *On Code* III. xxxiv. 2, no. 58, citing *Dig.* XLIII. xix. 1, § 5.

Yet these disputes never reached a legal settlement. For there was no judge available, and the law of arms prevailed.

No better or stronger was the case of the commander of a certain fortress, who requested and even forced a nobleman passing that way to remain with him that evening, which was a time of truce. In the night that followed, the commander's party broke the truce (which he all along knew would happen), and in the morning he detained the nobleman, as being captured by right of war, extorting from him a bond for a thousand crowns.

[I thus judge] because the initial point of capture must be looked 16
into and considered (cf. *Digest*, IV. iv. 3, § 2, where the glossator and Bartolus comment. This applies particularly when the end is necessarily determined from the beginning, as the Doctors there declare, especially Albericus[f]). So I hold that if the nobleman had remained that night of his own accord in the fortress, he might justly have been taken prisoner.[g]

[f] *On Dig.* IV. iv. 3, § 2, near end.

[g] According to *Dig.* XLIX. xv. 12, at the beginning.

But since he remained through the trickery of the commander and against his will, in truth it ought to be said that he was arrested in the evening and, therefore, in time of truce. For a person kept within [17]
four walls is subjected to forced imprisonment, as well as one who is actually bound;[h] and even that man is counted 'imprisoned' who may not depart at his pleasure, as Angelus[i] held.

[h] *Dig.* IV. vi. 9.

[i] *On Dig.* IV. ii. 22.

[1] [For *fictae* read *ficte*.—Tr.]

Yet we might say with Baldus:

> While thus she spake, Ulysses cast[1] the ship adrift.

For that[2] nobleman, who was himself a lawyer, cited the laws which in fact supported his contention; but the other, being a soldier, maintained his case by force of arms.

Here another question arises. Beyond the mountains, on the 5th of February, in the year 1555, as I recall, a five-year truce was made by their Royal Highnesses Philip of Spain[3] and Henry of France. On that same day, on this side of the mountains Marshal Brissac, [64′] commander of the French, took Vignale, where there was a garrison of Spaniards. Now it had been specified in the truce that from the above-mentioned date there should be a suspension of war, &c. Hence the question was raised whether that day belonged to the truce—with the consequence that the garrison could not be held, being taken outside the period of war.

18 For, in case of doubt, the words 'from this day' might be understood either as inclusive or as exclusive; and Cino,[a] who considers this question in his comment (see Baldus, too, on the same passage), says that if the subject-matter is favourable, they will have the inclusive sense; but the exclusive sense, if the subject-matter is unfavourable. Now a truce is more favourable than war; and retention is more favourable than seizure. This same question is taken up by Bartolus[b] at greater length. And, as regards time, he says that if the terminus can be included, the interpretation will be inclusive.

[a] *On Code* V. iv. 21.

[b] *On Dig.* XXXII. xxxv, § 1.

19 My opinion is that the instant of time should be emphasized. For in matters which are instantaneous, this is looked into carefully (so Baldus[c]). And this is particularly applicable to the present case. For it is unreasonable that acts of war should still continue after a truce is effected; and equally unreasonable to say, before the truce is made or even while it is in the making, that it is not a time of war, and that it is not permissible to do everything that falls within the scope of war. And it is not likely that the parties meant to include in the truce time that had already elapsed. Consequently, whatever happened before the truce, whether disaster or success, should be ascribed to war and settled fact.[4]

[c] *On Code* VI. xlii. 6, last col., and *On Feuds*, I. vi, § 2.

This conclusion is supported by the statement of Bartolus[d] that we should take the view which rules out an unreasonable interpretation.

[d] *On Digest* XXXII. xxxv, § 1.

[1] [For *solebat* read *solvebat*. See Ovid, *Remedy for Love*, 285, the original referring to the decisive act by which Ulysses cut short the blandishments of Circe.—Tr.]

[2] For *illae* read *ille*.—Tr.]

[3] [Belli's sentence may seem to imply that Philip was king of Spain, which is not quite exact. At the time of the signing of this truce, Philip was only king of England, and he is so designated in the truce. He became king of Spain in the autumn of the same year, 1555. The truce was between Henry on the one hand, and the Emperor (Charles V) and Philip, king of England, on the other.—Ed.]

[4] [Reading *facto* for *fato*.—Tr.]

Such was the position also of Baldus,[a] who says that the words spoken will be interpreted according to the dictates of sound reason and the intent of the contracting parties. And the illogical is by all means to 20 be avoided, as Baldus again remarked[b] in a discussion of this same subject.

Since, therefore, on that day it was permissible before the conclusion of the truce to engage in warlike acts, whereas after the conclusion of the same this was no longer allowable, we necessarily come back to the 'instant which' in the delimitation of peace—and for the simple reason that whatever is done is conditioned by the point of 21 time, as Baldus said on *Code* IV. xxi. 17.[c] And on *Digest* XXVIII. vi. 16, § 1,[d] he adds that we should make note of this, for he had seen actual application of the principle.

I raise the further question whether, after the time of a truce has run out, a new proclamation or declaration of war is required. (And Baldus[e] makes the distinction: (1) A war had not been declared or begun, though perhaps it was impending and the parties were preparing, and then a declaration is required; for lapse of time (he says) does not effect a removal or cancellation of obligation; or (2) the war was already in progress, and then a new declaration is not necessary.[f]) [65]

Above I argued that this may be conditioned: 'unless the truce be for a long period, even more than ten years'. However, Guy de la 22 Pape[g] holds without qualification that a declaration is not required. And Angelus[h] says that at the expiration of a truce we revert to the status that was interrupted by it.

Yet Baldus (vacillating as he is on every question) states elsewhere[i] that if parties who are not at war make a truce, it seems tacitly agreed between them that they will be at war after the lapse of the truce. This I do not believe to be correct; and perhaps the safer plan is to accept the verdict of Angelus as it stands and without qualification.

[a] *On Code* V. iv. 21, last words.
[b] *Consilia*, I. 457, beginning: *Reverendus pater*; repeated in an incomplete chapter, *Consilia*, V. 412.
[c] Col. 3, words *quaero quid de die.*
[d] Words *seu quam horam.*
[e] Tit. *De Pace Constantiae*, § 9, *loco ult.*
[f] Citing *Dig.* II. xiv. 27, § 1.
[g] *Decisiones*, 191, words *dic ergo.*
[h] *On Dig.* II. xiv. 27, § 1.
[i] *On Dig.* XXIX. ii. 77, last words.

HERE BEGINS
THE SIXTH PART OF THE WORK

# CHAPTER I

## ON VARIOUS QUESTIONS PERTAINING TO WAR

## [65′] SYNOPSIS

1 Unlawful articles of a partnership are not binding.
2 An unlawful partnership is not valid.
3 Whether a partner shares with another what he secures from a second partnership.
4 A partnership should be faithfully carried out.
5 The immediate and not the remote cause is to be stressed; so No. 8, second part.
6 How we should interpret, when it is agreed 'to hold friends as friends, and enemies as enemies'.
7 One who buys from the enemy of his ally and pays the price agreed is not counted to have broken the covenant.
8 Whether the expressions *ex*, *ob*, and *propter* imply an immediate cause, or even one of the second degree.
9 The meaning of 'fatal wound'.
10. Whether there should be remission of payment on account of war.
11 Whether there should be remission for a lessee in view of a moderate loss; and how this is to be interpreted.
12 Whether there should be remission of rent on account of war.
13 A loss sustained through a person's own fault must be borne by himself.
14 Whether remission should be made in favour of questuaries on account of war.
15 Whether the prospect and apprehension of war justify remission of payment.

To return now to the matter of war proper, I have already noted above that it is permissible for soldiers to make agreements among themselves as to securing booty from the enemy and sharing it with one another. So Baldus.[a]

[a] *Consilia*, II. 358, with citation of *Code*, II. iii. 19.

I now ask whether such compacts are valid[1] among brigands (i.e. persons who are not really enemies), or even among bona fide soldiers who make an alliance for improper ends, e.g. to plunder the provincials on their own side, or even those belonging to the enemy—but in violation of a covenant.

1 And there is no question that this sort of agreement is not valid,
2 according to *Digest*, XLVI. i. 70, at the end, where it is stated well and forcefully that a partnership entered into for disgraceful purposes is void. And the idea is expressed with no less precision in *Digest*, XVII. ii. 57 ('there can be no association for dishonourable purposes').

And this is not inconsistent with Cicero's statement[b] that even brigands have laws which they observe (he adds also that Bardulis, an Illyrian robber of note, and Viriathus, the Lusitanian, were well spoken of; and that through fair division of spoils they gained large renown and great wealth). For Cicero is talking of facts, and I am speaking of the law. And since, as I have said, associations for wrongdoing are disgraceful

[b] *On Duties* [II. 40].

[1] [For *valeat* read *valeant*.—ED.]

and revolting (as is stated also in *Digest*, XVII. ii. 53), a judge will not concern himself regarding these, nor will action be given on such a basis.

Here arises a question upon which it befell me to render judge- 3
ment. Titius and Seius, two comrades-in-arms, entered into a partnership with regard to whatever they should capture in the sack of a city. Without informing Seius, Titius made Sempronius his partner.[a] Query: How shall things captured be shared?

[a] See *Dig.* XVII. ii. 19 at end, and 20.

It is clear, at any rate, that Sempronius is not a partner of Seius; for 'the partner of my partner is not my partner'. Consequently Titius, who took Sempronius into partnership, will share with him whatever he derives from the partnership with Seius; but the latter will share nothing with Sempronius.[b] Thus Sempronius will have half of the share of Titius.

[b] See *Dig.* XVII. ii. 21 (which follows next after the two laws last cited).

Moreover, if Titius failed to acquaint Sempronius with regard to his previous partnership with Seius, I assume that he will be bound to share with him [66] *ad interesse*. For it would be unfair, if Titius acquired something, for him to share with Sempronius merely to the extent of one-fourth, keeping[1] a half of the gain for himself—for 4
partnership should be honoured to the full (cf. *Digest*, XIX. i. 13, § 29, which has to do with cases in which concealment of facts results in loss; and on this see gloss[c]).

[c] *On Dig.* XVII. ii. 7.[2]

But will Titius share with Seius what comes to him from the partnership with Sempronius? It is so implied by the wording of *Digest*, XVII. ii. 21 ('but his action will be guaranteed to the partnership'); and such was the view of Baldus.[d] For he says that the person who acquires a new partner alone shares with him, whereas whatever he secures from the latter he shares equally with his original partner. And this accords with the view of Fulgosius.[e]

[d] *Summarium*, *Dig.* XIX. ii. 19.

[e] *On Dig.* XIX. ii. 19.

But I fear that this is not sound. For we seem to be dealing with a partnership for the securing of gain in one's own person, which, therefore, does not cover things secured in other ways.[3] Compare *Digest*, XVII. ii. 7 and 8, where Bartolus and Baldus thus sum up: 'In a partnership entered into without qualification, only personal gains are to be shared.' And this is supported by *Digest*, XVII. ii. 52, § 5, where it is stated that partnership in one line of business does not extend to another. So also by section 6[f] of that same law. Yet, as I think, it would 5
be necessary to weigh the words of the contracting parties, and to reach a verdict according as the terms are loosely or carefully drawn.

[f] (Law otherwise cited as: *Si fratres essent.*)

In case of doubt, where acquisitions from plunder are to be shared, I should hold that the gain which accrues from Sempronius is not derived from plunder, but rather from a business contract—giving prominence to the immediate and proximate ground, and not to the

[1] [For *habiturus* read *habiturum*, since it seems to modify *eum* rather than *Titius*.—Ed.]
[2] [For *scire* read *coire*.—Tr.]
[3] [For *aliundae* read *aliunde*.—Tr.]

early and the remote, on the basis of *Digest*, XVII. ii. 8, and because of the reading *ex*, which has in view an immediate cause. (Whence Baldus[a] states that a statute which speaks of a person convicted of (*ex*) homicide does not include the instigator.) And there is no difficulty with *Digest*, XVII. ii. 21; for this should be interpreted to mean that Titius will guarantee to the partnership the action of the new partner, i.e. he will guarantee against any loss sustained through the latter's wrong-doing or carelessness. This is indicated by the laws that follow, especially 23, near the beginning; and so the glossator and Doctors there interpret.

[a] *On Feuds* II. liii. i, §§ 2 ff.

A further question: Two rulers make an agreement by which it is provided that they bind themselves to hold the friends of each as friends, and the enemies of each as enemies; and that, in defence of lands possessed by them, they will aid each other, and so make war and peace. Subsequently one of them buys from some other ruler a city which, before this compact was made, the latter had taken from that ally of his. Is he then to be judged to have violated his agreement?

Paolo di Castro[b] holds that the agreement has not been broken, because the pact has to do with lands that were possessed at the time the agreement was made, and therefore it does not apply to lands lost before that time. Furthermore, he declares that the man will not be bound by virtue of his agreement to bear aid to his ally, in case the latter chooses to undertake war to recover that city, nor will he be
6 bound to count the ruler [**66′**] who seized it an enemy. For that provision regarding holding friends as friends and enemies as enemies must be understood as applying to wars that are unavoidable, not optional, and to wars that are just and not to those which are unjust; and likewise to defensive, and not to offensive operations.

[b] *Consilia*, I. 295 (*Viso superscripto puncto*).

Consequently, as I have said, the aggressor in that antecedent
7 period before the compact is not to be regarded as an enemy. And on the basis of the fact that the price in money is paid to him for the city bought it cannot be claimed that the pact has been violated or that aid is being supplied to an enemy. So Paolo.

And he also adds there[c] that this third ruler had previously been in friendly alliance with the purchaser, and that they were old associates. Thus we fall into argument in a circle. For if I am bound to count your enemy as my enemy, and you are bound to count my friend as your friend: in case the same person is your enemy and my friend, the agreement cannot be carried out because of the conflict; or precedence will be given to that which is more reasonable.

[c] *Ibid.*, col. 4. words *praeterea et vasallus*.

I pass on to another question. It has been agreed that indemnity be paid for losses arising from war. Should this agreement be restricted to the losses due immediately to the destruction of war, or should it be made to apply also to those which have been occasioned by the war?

*Digest*, XLVII. ix. 1, § 2, states that a thing is counted as lost in war, if its loss is occasioned by the war; and to this view the majority and commonalty of Doctors incline.[a] Thus Albericus[b] states that when a certain nobleman of Savoy, governor of Padua, had his horse wounded in battle and the animal subsequently died, he was reimbursed for the loss of the horse on the advice of Ubertinus of Bologna. This, too, is what Bartolus[c] says.

[a] *On Dig.* XLVII. ix. 1, § 2; and *On Dig.* XXVII. i. 18.
[b] *Ibid.*
[c] *Ibid.*, main question.

It is my opinion that a distinction should be recognized: (1) A loss is sustained as an actual result of war (i.e. it would not have happened otherwise), and then a person may be said to suffer that loss as arising from the war itself, and the agreement to restore and to make good will apply; or (2) the loss would have occurred in any case, and then I reverse the decision. This is supported by *Digest*, XVII. ii. 60, §1, which makes a distinction according as something is done for (*in*) a partnership, or because of (*propter*) it; just as there is differentiation according as money has been paid to (*ex*) my interest, or because of (*propter*) it. Compare *Digest*, XV. i. 50, near the end, where Bartolus 8 draws a similar distinction between *ob* and *ex*, and between *de* and *ex*, on the basis of the laws which he cites. For, according to the laws quoted, it is a question of proximate and immediate cause; so, too, of the fundamental, not of the incidental.[d]

[d] *Dig.* XIX. i. 5; and *Code*, IV. xxxviii. 15, oppo. 3.

Yet Albericus says again[e] that if, by the terms of a compact, horses that are killed in the service must be made good to the soldiers, so, if a soldier went to Milan under the orders of a contracting party, and lost his horse in a fire that broke out in a hostelry, [67] he must be reimbursed, because he is counted as being engaged in the service until his return. This Albericus repeats on *Digest*, L. vii. 6, where he states that he secured such a verdict in an actual case.

[e] *On Dig.* IV. vi. 32.

But inasmuch as the laws on this subject seem to give different rulings (for in *Digest*, XLVII. ix. 1, § 2, it is stated that it is all one whether loss follows from war or on account of war, and the same thing is said also in *Digest*, XLVII. viii. 4, § 13; whereas elsewhere a sharp differentiation is made according as something happens from a thing, or on account of it[f]), the Doctors usually recognize the following distinction: a contingent circumstance is a necessary consequence of the original cause,[1] or it is not such a consequence. In the first case, it takes rank with the original cause; but not so in the second. So Albericus;[g] and this harmonizes with my distinction above (i.e. according as a loss was bound to occur or not).

[f] *Code*, IV. xxxvi, sole law; *Dig.* XV. i. 50, at end.

[g] *Summarium*, *Dig.* XXXIX. ii. 18, § 11.

Elsewhere they contrast subject-matter that calls for suspension of the common law, and material which does not call for such suspension; also they distinguish between subject-matter unfavourable and favourable. And in connexion with subject-matter unfavourable or calling for

[1] [For *Principem* read *principium*.—Tr.]

suspension of the common law, a thing which happens on account of war is not held to arise from it; but when dealing with favourable subject-matter, we interpret more liberally and even a remote cause is considered, whether motivating or material. So Albericus on *Digest* XLVII. ix. 1, § 2, and XXXIX, ii. 18, § 11, where he makes application to many questions; so too on *Digest* XXVII. i. 18, on the basis of that text (see also Baldus there).

Hence, from what has been said above, it is clear that different rules may be laid down in accordance with the variety of cases. For suppose that under an existing statute or agreement, to the effect that reimbursement is to be made to the owners for the horses of soldiers that are killed in war, or for oxen that a village is forced to send along with the troops, and which happen to die while with the army; now if it should chance that a horse is wounded in battle, and, after its return home, it comes to its death in the stall as a result of fire or collapse of the building, or if an ox, wearied out, on its way home falls in the way of bandits who capture it, surely these animals will not be said to have been lost in war.[a]

[a] Cf. *Dig.* IX. ii. 15, § 1, and 11, § 3.

Yet, in the case of the ox, justice calls for another decision; for that mischance at the hands of the bandits came to pass on account of the army, inasmuch as the poor rustic would not otherwise have visited that place. Also, in the case of a horse that has been so wounded in battle that it is clear that it cannot recover, I should think that the wounds were the critical thing, and not the accident of the collapse of a building.[b]

[b] So *Dig.* IX. ii. 51, § 1.

And while *Digest*, IX. ii. 51, § 1, seems inconsistent with the laws cited[c] (though in them all a mortal wound is assumed, but with varied
9 rulings), I think that by way of solution we should say [67′] that there are some wounds which indeed appear to the physicians to be mortal, either because of their location or other circumstances, but which, nevertheless, are not beyond the bounds of hope; whereas some are without question fatal, so much so that their cure is manifestly beyond the power of the surgeon's skill.

[c] *Dig.* IX. ii. 11, § 3, and 15, § 1.

And in the first case, death as a result of some accident will clear the skirts of the party who inflicted the original wound. And this bears on a case which I witnessed in actual practice, where a person had been seriously wounded, and the physicians from the start had rendered the verdict that one of the wounds appeared to be mortal, though this was not absolutely certain, and a month later a fever set in and the man died; for such a man is judged to have died either from the fever, or poor care, or from malpractice, and not from his wounds; and this I found to be the decision of Socini.

But in the other case, whatever may subsequently befall the wounded man, the person who wounded him will not be cleared of

even the crime and punishment of homicide. This accords with the glossator on *Digest* IX. ii. 15, § 1[a] and IX. ii. 51[b]; see also some remarks on this topic by Felinus.[c]

This discussion bears also upon the question whether a lessee 10
should be excused from payment on account of war. And assuming (1) that this has been so specified, the agreement will be kept, as is stated in *Code*, IV. lxvi. 1 ('whatever has been agreed upon between the parties shall be fulfilled to the letter'); or (2) no such mention had been made, and then: (*a*) the loss is serious, and excuse is granted, when the loss is unavoidable;[d] or (*b*) the loss is slight, and no allowance is made. 11
For the lessee ought to bear a moderate loss, inasmuch as he is not deprived of a profit when it is unusually large.[e]

But it is customary to differentiate otherwise in the case of the 12
tenant farmer, as Jason sets forth at length on *Code* IV. lxvi. 1, concluding, in accordance with the view of the ancients, that no indulgence is granted except when crops are an utter failure. But in actual practice I have ruled otherwise. For if the idea of 'contract' is approximated in a tenant farmer's agreement and it is in effect tantamount to a lease (just as 'tithe' and 'tax' are used in speaking of the Lord's share of the fruits)—as is true generally in the city of Asti, where everybody speaks of 'tenant farmer's agreement', though the payment is nevertheless one-twentieth, or five per cent.—I should have regard for the spirit rather than for the letter; for the essentials of a contract ought to weigh more heavily than a mere name.[f] Compare *Decretals*, III. xxxvi. 6, where 'tenant farmer's agreement' is used for 'tax'. At times the term is employed also of leasing, according to Jason[g] and Felinus.[h] And on this subject Decio may be consulted.[i]

Further, it is customary also to look into the time of the making of a 13
contract, to determine whether the lessee could have foreseen disaster —as, for instance, if he made the agreement at a time when war was now raging. [68] For in such a case he will not be excused, in view of the rule: 'A loss which a man experiences through his own fault,' &c.; see also the passage in *Digest*, XXXIX. ii. 13, § 6. The general question is treated by Baldus.[j] And Bartolus[k] attempts to determine what loss is to be counted great, and what counted slight.

Baldus[l] queries again whether, on account of war, indulgence 14
should be extended to those quæstuaries of St. Bernard, St. Anthony, and St. Bovo, and other persons of that sort, who contract for, or buy from the chief abbots the yearly income of those places.[3] And, in support of the negative, he says that they appear to have purchased a throw of the net or a cast of the dice. But he decides for the other view, on the

[a] Word *mortifere*.
[b] Word *teneri*.
[c] *On Decretals* V. xii. 16, el. 2, col. 2; and V. xii. 7, col. 1.
[d] *Dig.* XIX. ii. 15, § 1.
[e] So *Dig.* XIX. ii. 25, § 6.[1]
[f] *Dig.* XIX. ii. 15, § 4;[2] *Dig.* XIX. v. 6.
[g] *On Code* IV. lxvi. 1, no. 35.
[h] *On Decretals* V. iii. 36.
[i] *Consilia*, 140, col. 1; 144, col. 2, at end; 315, no. 2; 413, no. 5; and *passim*.
[j] On tit. *De Pace Constantiae*, § 9, at the middle.
[k] *On Dig.* XIX. ii. 15, § 8.
[l] *Consilia*, III. 247 (*Si propter guerras*).

[1] [This citation is corrected.—Tr.] [2] [The text of this title was once differently divided—Tr.]
[3] [See *quæstuarii*, under the general heading *quæsta*, in Du Cange's *Glossarium mediæ et infimæ Latinitatis* (Niort, 1886), vol. vi, p. 590, col. 2, which refers to the activities here described.—Ed.]

ground that the hazard[1] of this income and the hazard of the dice are not alike. For in one case the hazard is absolute, in the other some
15 certainty is assured from among the chances.

Whether the mere apprehension of coming war helps a contractor to secure remission in the same way as war itself does, is a matter which I have touched upon above,[a] with citation of Petrus de Ancharano.[b] And, to supplement what is there said, consult Joannes of Imola,[c] who is reported and followed by Decio.[d] I am supported also by the words of Cicero in the speech *For the Manilian Law*,[e] as quoted above.

However, many details will have to be taken into account;—for example, how long was the time that the apprehension lasted, of what sort and how great was the loss it entailed, whether the fear was groundless, and whether the apprehension was shared by all or the greater part.[f] In regard to this matter Ripa[g] states that a period during which renewal of war is feared more nearly approximates war than peace; and he, too, cites the passage from Cicero above noted, though he says 'in the speech for Gnaeus Pompey'—which, however, is the same that I referred to.

[a] Part V, Chap. 1.
[b] *Consilium* 88.
[c] *Consilium* 7 (*Restat videre*).
[d] *Consilium* 617, no. 12.
[e] [15]

[f] *Dig.* XIX. ii. 27, § 1.
[g] *De peste*, cap. *de privil.*, no. 15.

## CHAPTER II

### WHETHER EXEMPT PERSONS SHOULD BE ASSESSED FOR PURPOSES OF WAR

### SYNOPSIS

1 Whether exempt persons may be subjected to a war tax.
2 If taxes are increased, how this is done, and to whom they apply.
3 A substitute tax is on the same footing as the one which it replaces.
4 When, because of war, a tax is imposed upon those who have privilege of exemption.
5 In time of dire need, exemption does not avail.
6 When the church is bound to contribute with the laity.
7 When the resources of the laity are counted insufficient.
8 The laity is wholly hostile to the clergy.
9 The clergy are more holy than the laity.
10 The clergy should be sympathetic toward the laity.
11 [68′] Your profession and your desires do not agree.
12. Church officers normally are not liable to burdens and taxes.
13 Whether a church may be intrenched for use as a fort.

I ASK next whether exempt persons should participate in taxes and
1 other public burdens that are imposed on account of war. *Code*, X. xxvii. 1, with gloss, answers in the affirmative; and so Bartolus holds on that passage, citing Dynus on *Digest* XXX. i. viii, where all the post-glossators treat this subject, and Jason states that the view of Dynus is generally accepted.

[1] [For *in certitudo* read *incertitudo*.—ED.]

But Baldus[a] discusses at length the subject-matter of *Code*, X. xxvii. 1, and makes a distinction between pay for the soldiers and the other demands that arise on account of war. For the pay, he says, definite and regular provision is possible; and it is cared for by revenues and other funds turned in by contributors.[b] But in regard to the demands which seldom arise and which cannot readily be anticipated (as for the purchase of foodstuffs in time of scarcity) he favours the other view.

Hence we gather from his words that, in case of shortage in pay, those alone will contribute who otherwise customarily provide what is contributed for that purpose (this being a normal tax with a regular procedure), and that exempt persons will not be burdened; but that the case will be otherwise, if anything serious and unexpected happens. That, perhaps, was the explanation of the special case mentioned by Raimondi;[c] though Jason, overlooking the above mentioned *Consilium* of Baldus, says that this plea is a refuge of the wretched.

And, perhaps, too, the reasoning of Baldus[d] looks in this direction when he makes a distinction according as a tax is imposed either on the principle of multiplication, or simply; for when a simple tax is doubled 2
or multiplied, only those persons will be held for the increased tax who were liable for the original. On this point compare Bartolus[e] and 3
Baldus,[f] both of whom hold that when one fund is substituted for another for some public purpose, the source is looked into, that we may determine who are liable. See Baldus again[g], and Ripa[h]; though Jason[i] rails at this view of Baldus.

But when a tax is imposed simply, exempt persons can more readily be burdened; though there [**69**] might be such breadth of provision and privilege that even a war emergency will be covered, as was stated by Parisio,[j] in an opinion which he rendered to the Lords of Sarralunga, my fellow countrymen of Alba. But such exemption was little observed by them in the recurrent calamities of war.

And truly the necessity might be so pressing and[1] urgent, particu- 4
larly if it may not be met without contribution from exempt persons, that it would then be fair that even they be obliged to contribute, as Socinus[k] said. This is supported by the text and the commentary on *Decretals* III. xlix. 4; for if in such emergencies contribution is made by the church, how much more will those contribute who hold exemptions from princes, the latter being not seldom liberal and munificent at the expense of others—a practice which is denounced by Lucas de Penna ?[l]

In fact the need might be so great that even a formally granted 5
immunity that had taken on the character of a contract would not hold; compare *Digest*, XVIII. i. 78, § 3, the comment of Bartolus,[m] and *Digest*,

[a] *Consilia*, III. 458 (*Lata fuit sententia*), repeated in V. 406.

[b] So *Authent.* viii, § *oportet.*

[c] *On Dig.* XXX. viii.

[d] *On Dig.* XXX. viii.

[e] *On Code* X. lxiv. 1, words *quaero utrum.*

[f] *On Code* VII. liii. 5, last col., words *hoc modo.*

[g] *On Feuds* II. liii. i, § 6, two last cols.

[h] *Resp.* II. xxvi, last col.

[i] *On Dig.* XXX. viii, col. 3, ¶ 3 (*fuit opinio*).

[j] *Consilia*, I. 68.

[k] *On Dig.* XXX. viii, concl. 3 and 4.

[l] *On Code* X. xix. 4.

[m] *On Dig.* XXXIII. i. 10, § 1.

[1] [For *tanquā* read *tamque.*—Tr.]

6 II. xi. 4, § 4, where it is shown that a person who accepts all the risk of chance happenings is not responsible for anything exceedingly unusual.[1]

7 As for my statement above that the Church is bound to contribute with the laity when the latter's resources are not sufficient to meet the assessments, this same principle applies also to the case where a loss averted by a money payment is one that would affect the clergy as well as the laity; e.g. when the looting of a city or the invasion and devastation of a territory are threatened, and the matter is settled on a money basis. See Bartolus[a] on this point, which is treated at length by Jason,[b] though he does not cite Petrus de Ancharano.[c]

But it is not made clear under what circumstances the resources of the laity are to be counted insufficient. For the laity often has a 8 way of taking advantage of a situation, being altogether unfriendly to the clergy.[d] It is the fairer plan, therefore, to leave the decision to the bishop of the diocese; for *Decretals*, III. xlix. 4, states that the bishop and one of the clergy should investigate how great is the need or the necessity in question, when it is claimed that resources are not sufficient. 9 And this seems the more just, in view of the fact that the clergy are better and holier than the laity, and because the more worthy should take precedence over the less worthy.[e]

10 But the clergy for their part, in case of real need, ought to show themselves ready to support and help those in trouble, lest they be open to the reproof which the Emperor[f] administered to a philosopher 11 who petitioned for exemption from taxation: 'Your profession and your desires', said he, 'do not agree. For, though posing as a philosopher, you are a slave to the rapacity of greed'—words which are quoted by Lucas de Penna[g] [69'] against the clergy in this connexion.

And though he goes on to enumerate many cases[h] where the Church 12 and the clergy are bound to contribute with the laity, I think it safer and sounder to say without further qualification that they are under obligation in none but the two cases above mentioned, namely, when it is a question of common advantage, and when the laity is much impoverished[2] and staggering under the weight of taxes. But I understand this, however, in the light of the restriction mentioned in *Decretals*, III. xlix. 7, i.e. that action be taken only after consulting the Apostolic See, unless the need be urgent.

Perhaps we might say that the resources of the laity are insufficient when the taxes consume a little less than the whole year's profit and income.[1]

13 Here I raise the incidental question whether it is permissible[3] in time of war to construct fortifications in a church and to intrench or, as they say, to fortify it against the enemy. The legists declare that

[a] *On Code* XII. l. 11.
[b] *On Dig.* XXX. viii, no. 16.
[c] *Consilium* 96 (*Super dicto dubio*).
[d] *Decretum*, II. ii. 7. 49, and 14.
[e] Cf. *Decretals*, III. xl. 3, with comment of Bartolus on *Code* VII. lxii. 32, § 5, at end.
[f] *Code*, X. xlii. 6.
[g] *On Code* X. xix. 8, near end of Commentary, words *honeste igitur facerent clerici.*
[h] *Ibid.*, col. 2, words *et quidem Ecclesiae.*
[1] Cf. *Dig.* XLII. iii. 6, with note of Bartolus there and on *Dig.* XXXIV. i. 22.

[1] [Reading *insolito* for *insolido*.—Tr.]
[2] [For *exhaudisti* read *exhausti*.—Tr.]
[3] [For *liceat ne* read *liceatne*.—Ed.]

this is permissible. So Baldus,[j] who cites on this point Jacobus of Arezzo, Cino, and Petrus Bellapertica, adding, however, that the canonists dissent.

And in fact the latter do here make a distinction. For Hostiensis[a] states that such action is not permissible for those who are engaged in aggressive warfare, especially bandits; but he says that in time of need, with the permission of the bishop, and because of fear of heretics or heathen, or even of robbers, or to protect the property of the church, fortifications may be constructed temporarily, with the understanding that when the stress and the emergency have passed, the works will be demolished. That accords very well with the view of the Archdeacon,[b] who says more concisely that fortification is permissible for defence but not for offence; and this is elaborated by Panormitanus.[c]

[j] *On Code* I.i. 2.

[a] *Summa*, § *In quantum*, words *item ecclesia*.

[b] *On Decretum* II. x. 1. 14.

[c] *On Decretals* III. xlix. 5.

[70]

# HERE BEGINS
# THE SEVENTH PART OF THE WORK

# CHAPTER I

## ON THE PRIVILEGES OF SOLDIERS

## SYNOPSIS

1 The state is maintained by reward and punishment.
2 A father makes presents to his son, and a wife to her husband, for military purposes.
3 Whether the gain from a dower belongs to a husband in the army, or to his father.
4 A soldier who is a *filiusfamilias* disposes by will of his military possessions.
5 Likewise a *filiusfamilias* in the civil service disposes by will of his personal belongings.
6 Whether a cardinal who is a *filiusfamilias* may legally make a will.
7 A *filiusfamilias* in the army may make pupillary substitution for his son.
8 A soldier makes his will as he wishes, and as he can.
9 Two witnesses to a will are sufficient. But understand this as explained in the text.
10 A codicillary clause is understood in a soldier's will.
11 In regard to military property a soldier may directly name a substitute heir at any time.
12 A new interpretation of *Code*, VI. xxvi, 8 and *Digest*, XXVIII. vi. 15.
13 *Code*, VI. xxvi. 8 and *Digest*, XXVIII. vi. 15 explained differently than other Doctors have understood them.
14 A soldier may die in part testate, and in part intestate.
15 Many laws which seem contradictory are expounded with reference to the claim that a person named as heir to a definite part takes the whole. In regard to a soldier's will, the rulings of the laws seem various.
16 Whether the right of accretion has place in a soldier's will.[1]
17 Whether a person prevented from succeeding by right of accretion is to be counted as barred also from intestate succession.
18 *Digest*, XXXVIII. ii. 42, § 1 interpreted otherwise than the Doctors have understood it.
19 An heir may be appointed for a definite time by a soldier.
20 The birth of a son does not break a soldier's will.
21 A soldier may make a will, though uncertain of his status.
22 A soldier cancels a will under the same conditions as he executes it.
23 [**70′**] A will made by a civilian holds under the military law, if, becoming a soldier later, he so desires.
24 A soldier may die with many wills.
25 An incomplete will, made at a later date, nullifies an original will regularly drawn.
26 *Digest*, XXIX. i. 35 explained differently than by the other Doctors.
27 Camp followers make their wills under the military law.
28 Whether a man assigned for service is to be rated as a soldier.
29 A soldier condemned to death makes a will covering his military possessions.
30 A soldier condemned to death transmits his military possessions to his legal heir.
31 Whether the Trebellian portion is to be subtracted from a soldier's property.
32 Whether a soldier released from service retains the privileges of a will made under the military law.
33 The year following release has some privileges. See the text, and the two following numbers.
34 Honourable discharge.
35 After how many campaigns soldiers may be discharged.
36 Rewards are due the man discharged.
37 How mustering out and discharge differ from one another.

[1] [For *testameuto* read *testamento*.—Ed.]

[a] [*Ad M. Brutum*, I. xv. 3.]

ACCORDING to Cicero,[a] Solon stated that the commonwealth is 1 upheld by two things, reward and punishment—a sentiment well befitting such sagacious men. For a state cannot long endure in which virtue is not honoured and rewarded and crimes punished.

Since, therefore, the soldiers of old endured heavy toil in the service of the state, not a few rewards, prerogatives, and privileges were with good right accorded to them. These it is my purpose to review[1] (if not all, at least the greater part), to the end that the soldiers of our day also may fight courageously, and by worthy service show themselves deserving of having like rewards given them even now.

This then shall be first of the privileges, that whatever is presented to 2 a soldier by his parents as a gift (provided that it is something for use in the service) falls under the military law, and becomes a part of his military acquisitions;[b] though, under other conditions, gifts from parents to children have no legal standing. On the same principle, too, a woman may give her husband, as he goes forth to service, such things as are suited for military use—if, however, it is specified that the gift is for this purpose.[c]

[b] *Dig.* XLIX. xvii. 3, 4, and 11.

[c] *Ibid.*, 8, word *plane*.[2]

But if the wife makes the presentation without comment, or if the things given are not suited for war purposes, the gift is not valid—and this holds, even though it is stated that the gift is for military use [71] in defiance of the fact that the thing is inappropriate and unsuited to a soldier; for regard is had for the fact rather than for mere verbiage.[d] However, the gift even of an unsuitable thing might stand, if it is presented with the intent that through its sale appropriate things shall be secured, e.g. arms or horses. So Bartolus[e]. Thus you see, reader, that the rulings are various as to the things which a wife gives her husband in the service.

[d] *Ibid.*, 8.

[e] On the same law.

And there is variation also in the regulations having to do with 3 another important case involving the same parties, namely when the wife of a soldier dies, and his father is still living. For if the gain from the dower passes to the husband by agreement or by statute, that gain being connected as it were with marriage, is ascribed to its liabilities, and falls to the children of the union, who are under the control of their grandfather. But if it is a question of succession itself to the wife's estate, the latter is acquired by adventitious right by the *filiusfamilias* himself, and is held as a part of his *peculium castrense*; see *Digest*, XLIX. xvii. 16, near the beginning.

To touch another point in passing, it is ordered in section 1 of the above law that inheritance of one brother from another who is his comrade-in-arms shall be recognized under military law, provided that the brothers are serving in the same camp or in the same province; but

[1] [For *re censere* read *recensere*.—ED.]
[2] [Replaced by *nominatim* in the version now current (?).—TR.]

not so if they are in different places—thus apparently stressing more the fact of association than the inherent claim of relationship.

4 But over his military acquisitions the *filiusfamilias* has such absolute control that if, after becoming *sui iuris*, he again passes into his father's power through adoption, he still retains this right.[a]

It is a second privilege of a *filiusfamilias* in the service that he 5 may freely dispose by will of his military acquisitions.[b] And this privilege applies also to the unarmed or civil service; so *Code*, III. xxviii. 37. Therefore a Doctor who is a *filiusfamilias* may dispose by will of his military acquisitions.[c] But he must observe the forms of common law; see the same passage, section 1 *f.* ('to execute a last will and testament according to the laws').

6 This passage was overlooked by Jason[d] in his discussion whether a cardinal who is a *filiusfamilias* may make a will, and he criticizes Baldus for saying that such a will is possible under the military law. But, as I think, the decision should be based upon the ruling of the above cited section 1 *f.*

However, Martinus Laudensis[e] states that, according to Hostiensis, it is the rule of the Roman court that cardinals may not execute a will except by permission of the Pope. But, again,[f] citing the same statement of Hostiensis, he restricts its application to monks or recluses of other kinds who have been made cardinals;[g] beyond this, he says, he does not see what is to prevent the making of a will;[h] but, supposing that such was the rule of the aforementioned court, such rule was by all means to be observed. This seems to me sound.

7 The military privilege in will-making extends even to pupillary substitution, i.e. to making a will for a son. Moreover, this privilege belongs to a soldier who is at once [71'] father and *filiusfamilias*.[i] But he may not appoint a guardian for that son of his, lest his privilege should begin to be prejudicial to the grandfather.[j]

He also may cut off this son from succession to his military acquisitions—including even succession by law,[k] a matter that will be discussed more fully below. And he may make a will separately for a son under the age of puberty, or for himself and son.[l]

8 Another (and fourth) privilege touching wills is that soldiers execute them as they wish and as they can,[m] but yet with reservations: 9 (1) the will is made in camp, apart from all peril to life, and then two persons must be asked to witness it;[n] or (2) it is made in actual battle, and then the testimony even of two chance witnesses suffices[o] (so says a gloss on *Digest*, XXIX. i. 1, and, as a matter of fact, in such a case it will be sufficient if the soldier has written the name of the heir on his shield, or in the dust, perhaps even in his own blood and with his finger[p]); or (3) the will is executed at home, and then it will be drawn in accordance with the common law.[q]

[a] *Dig.* XLIX. xvii. 4, § 2.

[b] *Dig.* XXIX. i. 11, § 2; *ibid.* 17, § 3; *ibid.* 22 and 23.

[c] *Code*, III. xxviii. 37.

[d] *On Code* VI. xxi. 3, nos. 4 and 5.

[e] Tract. 1, *De Cardinalibus*, qu. 13.

[f] Tract. 2, *De Cardinalibus*, qu. 17.

[g] So according to Baldus, on *Authentica* following *Code* I. iii. 28 (*Licet*).

[h] According to the rulings in *Decretals*, III. xxvi. 1, 7, and 12.

[i] *Dig.* XXIX. i. 28.

[j] *Ibid.*

[k] Cf. *Dig.* XXIX. i. 29, at end, and 30; so according to Bartolus, on *Code* VI. xxvi. 8, col. 2, at end.

[l] *Dig.* XXIX. i. 15, § 5.

[m] *Ibid.* 1.

[n] *Ibid.* 24.

[o] *Ibid.* 40.

[p] See *Code*, VI. xxi. 15.

[q] *Ibid.*

There is also the further privilege that, in a soldier's will which has been executed according to the common law, there is understood[1] the provision: 'If this does not hold under the common law, it shall stand under the special law.'[a] 10

[a] *Dig.* XXIX. i. 3.

Another privilege is that the soldier may name directly a substitute for any heir to his military acquisitions, just as if a father were making a will for a son under the age of puberty.[b] Hence the statement[c] is less surprising that in the same manner he names a substitute even for a son of his who has reached the age of puberty. 11

[b] *Code*, VI. xxi. 15, with gloss there.

[c] *Dig.* XXVIII. vi. 15.

But there will be this difference between military and civil possession, namely that in regard to the former, even after the son reaches the age of puberty, the soldier exercises a direct right; whereas during the time preceding puberty his right extends to everything.

However, reader, since the way here is rough, pray attend. For a father's right to name directly, in regard to the whole property (even to the complete exclusion of the mother) a substitute heir for a young son under the age of puberty is by no means a matter[2] of military privilege. For by the common law this is the right of any one;[d] but the soldier's special right consists in this, that he can make a direct substitution for all time, and that it holds permanently. With a civilian the case is different; for after his son reaches the age of puberty a direct substitution becomes utterly void.[e] I recognize, however, that in the case of the soldier, after the son reaches the age of puberty, the substitution does not apply to other property than that which comes from the father, in regard to which even the mother is debarred. See Bartolus on *Digest*, XXVIII. vi. 15 and *Code*, VI. xxvi. 8. 12

[d] *Dig.* V. ii. 8, § 5, with comment by all on *Code*, VI. xxvi. 8.

[e] According to gloss on *Dig.* XXVIII. vi. 15.

And although the above laws seemed opposed and contradictory (for the latter suggests that, in the case of a soldier's will, [72] a short substitution merges into a trust after puberty, whereas the *Digest* reference indicates that it is maintained as direct—a discrepancy for the solution of which Jason[f] exerts himself diligently, citing seven opinions of the early Doctors who held varying views)—if a humble person like myself, fully conscious of the limitation of his understanding, may express a little of his thought with all due respect for such eminent authorities, I believe that we should say that in *Code*, VI. xxvi. 8, the substitution is one of trust, and that those words 'as in a case of trust' refer to the thing as a fact, not being used by way of comparison—despite the hair-splitting in which Fulgosius and Jason here indulge. For the expression *velut* ('as') can figure in a statement of fact quite as well as the word *quasi*. So gloss and Doctors on *Decretals*, I. xxix. 20, where Felinus[g] expresses approval at length—his usual fashion. 13

[f] *On Code* VI. xxvi. 8.

[g] *On Decretals* I. xxix. 20, col. 4, towards end.

But in *Digest*, XXVIII. vi. 15, the substitution was really direct. And so the explanation of the difference is to be sought in the fact and

[1] For *sub intelligatur* read *subintelligatur*.—ED.] [2] [For *versatnr* read *versatur*.—ED.]

not in the law. For the *Digest* reference plainly states that the soldier makes a direct substitution up to the twenty-fifth year. It is clear, therefore, that he meant to make the will under the special military law; for he could not otherwise have so substituted up to that age, except by privilege. Naturally, then, throughout all that period the substitution holds uniformly under the soldier's special right.

In *Code*, VI. xxvi. 8, on the other hand, it is clearly stated that the soldier specified no time ('not up to a certain age'); and the gloss there, which says 'likewise, if up to the twenty-fifth year', makes nonsense of that law. It would have been better to say 'otherwise, if up to the twenty-fifth year', for this would have harmonized the laws under discussion. For since *Code*, VI. xxvi. 8 does not specify a time-limit, and the substitution might be based on the common law and also on the military, in view of the doubt it is assumed that the soldier meant to make his will under the common law.[a]

[a] According to *Code*, VI. xxi. 6.

The above seems to me the most obvious explanation. But it should be accepted with caution, as it differs from all others.

14 It is also a military privilege that a soldier may die testate in part, and in part intestate.[b] From which it follows that in corresponding fashion he may make one person[1] heir to his military acquisitions, and another to his civilian possessions.[c] In this case the debt encumbering any part of the estate will become a liability of the heirs. And if one of them, finding the burden too heavy, refuses to accept (supposing, for example, that very large military accounts are left unsettled), the other, even if he has already taken up his share of the inheritance, will be required to take on this other also, or to renounce his claim to either.[d]

[b] *Dig.* XXIX. i. 6; *Code*, VI. xxi. 1 and 2.
[c] *Dig.* XXIX. i. 17, § 1.
[d] *Dig.* XXIX. i. 17.

15 But as for the statement at the beginning of *Digest*, XXIX. i. 17, namely that if a soldier divides his whole estate among several appointees, they will none the less be heirs upon a par,[2] and will receive their particular appointments as if pre-legacies, I do not think that this concerns military privilege. For the soldier exercises this right in common with other people, as he does many others which I shall take up [72'] in another place.[e]

[e] For confirmation see *Dig.* XXVIII. v. 35, at the beginning, with § 1.

There seems, however, to be a conflict in the rulings of *Digest*, XXIX. i. 6, and 17, near the beginning; also of *Code*, VI. xxi. 1 and 3; so, too, of *Digest*, XXXVI. i. 17, § 6, and XXXVIII. ii. 22, § 1. Upon this difficulty the glossator exerts himself in comment on the passages cited, and especially on *Code* VI. xxi. 1. So also all post-glossators, especially Alexander and Jason, who cite others. The glossator's idea everywhere is that it should be held that the soldier made the disposition with reference to a definite property, with intent to die intestate as to the remainder; and this is the commonly accepted view.

[1] [For *alrerum* read *alterum*.—Ed.]
[2] [Lines 38 and 39 of this page of the Latin text are transposed.—Tr.]

Saliceto, however, recognizes a distinction: (1) In making his will, the soldier followed the common law, and it is to be assumed that he desired to bequeath throughout under that law; then there will be application of the right of accretion, and the person appointed to inherit specific property will acquire the whole, unless there is added a restrictive clause; (2) the military procedure is followed, and there will be no room for the right of accretion—this being justified by the fact that one and the same ruling should not be made under diverse laws.

Another distinction was made by Joannes of Imola, as reported by Alexander here, namely: (1) The soldier made some one heir to a particular and definite thing, and the residue will go to the legal heir; or (2) he distributed the whole estate, and it is entirely taken up;[a] or (3) he made a fractional distribution, e.g. assigning to one a twelfth, and to another a sixth (as in the case in *Code*, VI. xxi. 3), and it might be assumed that he desired to enlarge the twelfths, and in such a way as to take up the whole—i.e. so that the man who was named for a twelfth would receive a third, and the one named for a third would receive two-thirds—making no difference, as it were, whether he named one for a third and the other for two-thirds, or, as has been said, one for a twelfth and the other for one-sixth or two-twelfths (which is to say that he desired his will to stand under the common law).[b]

[a] *Dig.* XXIX. i. 17, at the beginning.

[b] According to *Inst.* II. xiv, § 5, words *non autem*, and ff.; and *Dig.* XXVIII. v. 13, § 1.

But this last cannot apply where the disposition by will has to do with definite[1] classes of things. Such is the view taken by Fulgosius and Romanus here,[c] and upon a passage in *Digest*, XXXVI. i. 17, § 6, which, however, seems to make for the contrary. For, it is therein stated that just as a soldier's will touching specific property is valid, and action is allowed the heir, so by the decree of the senate there referred to, right of action on the basis of specific property will be transferred. And yet it is clear that by the common law right of action is not transferred to a man made heir to specific property.[d]

[c] *Ibid.*

[d] *Code*, VI. xxiv. 13.

They meet the difficulty by supplying the words 'as a whole' with the phrase 'touching specific property' in *Digest*, XXXVI. i. 17, § 6. This, according to Alexander, does violence to the passage, though in my judgement the interpretation is not forced; for it is assumed that the *fideicommissum* covered a generality, i.e. Italian or provincial possessions. Accordingly, the comparison of the jurisconsult which follows there should be understood of a parallel case.

Again, that comparison might be understood to mean that if [73] a *fideicommissum* is executed in regard to a specific thing, action will be transferred to the extent of that thing, and because of it. Such was the view of Alexander there.[e] Or, finally, it might be said that the right of action passes over by special dispensation and military privilege. This

[e] words *ideo substinendo.*

[1] [For *incertis* read *in certis*.—Ed.]

is not precluded by *Code*, VI. xxiv. 13, which has to do with a civilian, and with a view to the common law.

There is still another distinction, made by Angelus, as Alexander there reports also: (1) The will specifies a quantity or a definite thing, and then the man is intestate as regards the rest; or (2) the appointment is proportional, and then the reverse is true. This does not appeal to Alexander—though not even this distinction is to be called absurd, for a proportional share takes to itself the residue more readily than if the appointment has been made with reference to a definite thing—even in the case of a soldier's will. For in the case of those having a proportional share transfer is easier.[a]

[a] *Dig.* VI. i. 23, § 5.

Yet the distinction is discredited in *Code*, VI. xxi. 1 and 2 (although it might be possible to harmonize, in view of the qualification 'particularly' which appears in the first of these laws, and the restrictive expression 'merely' which is in the second); and there is dissent on the part of a gloss[b] which holds that appointment as heir to civil or military possessions is not extended to the residue.

[b] *On Code* VI. xxi. 1, at end.

To me it seems the better plan to understand *Digest*, XXIX. i. 6, exactly as it stands, namely, that by virtue of the very fact that the soldier named an heir to a farm or some other specific thing, he desired all the remainder to go to his heirs by intestate succession.[1] This is everywhere the verdict, e.g. on *Code*, VI. xxi. 1 and 2, *Digest*, XXXVI. i. 17, and other similar laws.

And there is no difficulty with *Digest*, XXIX. i. 17. For the sound and correct text there states that the testator appointed one person as heir to his city possessions, another to his country holdings, and a third to the remaining (*ceterarum*) things. For who with even a smattering of Latin would say 'the third to certain (*certarum*) things'? And what would be the meaning of such a phrase?

This,[2] too, is the reading of the text in section 1 of that same law ('one to the military acquisitions, another to the residue'). So in *Digest*, X. ii. 25, § 1, so also in XXXVIII. ii. 42, § 1; and thus Haloander corrects the above-mentioned *Digest*, XXIX. i. 17, as I find it in the Nuremberg Pandects.[3] With this understanding, all the above-cited laws are harmonized.

For in case a soldier has named one of his comrades-in-arms as heir to his civil possessions, if he appoints another as heir to the remainder, the latter will inherit the entire residue. But if he declines, his share will not go by accretion to the person named for the civilian possessions; for the men are not coheirs (despite the fact that the last named is obliged to shoulder the whole and to satisfy all creditors, or to

[1] [For *ad intestato successuros* read *ab intestato ad successuros*.—Tr.]
[2] [i.e. *ceterarum* rather than *certarum*.—Tr.]
[3] [For *pandectis. Nurembergensibus* read *Pandectis Nurembergensibus*.—Ed.]

renounce his claim altogether, as I stated above, citing *Digest*, XXIX. i. 17, § 1). And between persons thus appointed there can be no action for division of heritage; for there are, so to speak, two inheritances, as is stated in section 1 of the law just cited, and in *Digest*, X. ii. 25, § 1.

But if the testator names no one for the residue, this will fall to the legal heir, on the assumption that the man intended to die intestate.[a] (And I do not think that a distinction should be made [73′] according as that part to which he appointed an heir was a general or a specific thing. For we must assume that his intent was still the same—namely, that he desired to die intestate as to the remainder. For, since this was his privilege, what matters it whether he names an heir for a single farm which he has, for example, in France, or for all the provincial possessions he there holds? And why should the person designated take everything to himself any more in the second case than in the first?) This view is supported by *Institutes*, II. xiv, § 5, if you connect the phrase 'unless he be a soldier' with what has already been said above in that same paragraph, namely, that if a person is named heir to a half, the whole (*as*) is contained in the half.

[a] *Dig.* XXIX. i. 6.

With reference to *Code*, VI. xxi. 3, which seems out of harmony with this position—for therein we read that a daughter appointed to two-twelfths and the wife appointed to one-twelfth will take the whole inheritance, just as if they had been appointed with the provision that the daughter should have two-thirds, and the wife a third—I answer that this is true here because the choice fell upon the daughter, who otherwise was the legal heir;—so that it is easier to believe that the soldier desired to increase the twelfths, and augment them to the point of covering the whole (which is as much his right as it is a civilian's[b]) than it is to suppose that he desired the residue, i.e. three-fourths, to go to the legal heirs by intestate succession; for the legal heir,[1] i.e. the daughter herself, was selected; and in regard to her it is not so likely that the soldier desired the inheritance to come by different methods (namely, a part by testament, and a part through intestate succession) as it is probable that he meant to follow the common law, with expansion of the twelfths, as I have said.

[b] *Inst.* II. xiv, § 5.

For when a soldier appoints an outsider as heir to a definite thing, naming no one for the residue, it is assumed that he desires the remainder to go to the legal heirs. But when he thus selects the legal heir, what else can we suppose he intended than the procedure which as it were by necessity the law demands, namely that the appointee receive everything under the will—there being no room for the above tacit assumption?

And though it might be objected that, in the case cited in *Code*, VI. xxi. 3, it could still be assumed that the soldier desired that three-fourths also fall to the daughter by right of intestate succession (inasmuch as he appointed neither of the parties to it), we may answer that

[1] [For *legitimus* read *legitima*.—Tr.]

in such a situation two legal solecisms are simultaneously involved: (1) that the soldier desired that one and the same daughter be his heir, in part by will, and in part by intestate succession—a situation not elsewhere found[1] in law; and (2) that the appointment to a fraction would hold only for that fraction, and would not draw to itself the residue by right of the will. And yet nowhere else in law are two solecisms simultaneously involved.[a] This interpretation of ours differs little from that of Imolensis, as reported above, except in so far as it is supported by other considerations which he too, perhaps, had in mind. And as for my saying above that it makes no difference whether the appointment is made to a specific or to a general thing not including [74] the whole estate, there is support in *Digest*, XXVIII. v. 79, near the beginning, if we may argue from the contrary. For it is there stated that a person not in the service appointed one man as heir to his Pannonian possessions, and a second to his Syrian; and it is said that they are counted as heirs upon a par, and to the whole—implying, as it were, that the case is different with a soldier's will; for what else could be inferred from the words 'who was not in the service'? And such is the statement
16 of gloss 1 there: 'Otherwise', it reads, 'in the case of a soldier'. Furthermore, as regards the case in *Digest*, XXVIII. v. 79, it is certain that between the men so appointed there was place for the right of accretion. But I take it that the decision would have to be different, if it were a soldier that made a will in this way; for then the inheritance rejected by one of the appointees will not go to the other by accretion, but will fall to the intestate succession, as is stated in *Digest*, XXXVIII. ii. 42, § 1.

[a] Consult *Code*, V. xi. 1.

In regard to this last, the glossator and Doctors find difficulty
17 with *Code*, VI. xxi. 1, according to Alexander there.[b] For, on the basis of the above law, they state that a person excluded from succession by right of accretion is not for that reason to be accounted excluded from intestate succession; but I cannot see how[2] they gather this from that law. For, in the first place, the freedman Titius was not such a person as could succeed by legal right (for, by Roman law, freedmen are not designated as legal successors to their patrons, but contrariwise, patrons are designated to succeed freedmen), and, second, he there succeeded to the things mentioned for no other reason than that he had been named for the military acquisitions.

[b] In no. 7.

18 And as for the reading of the text 'the inheritance was taken up[3] by Titius through intestate succession', the words 'through intestate succession' are an interpolation, and they do not appear in good editions. And this is clear from the statement itself; for since it reads that though the inheritance has been taken up by Titius, his patron still has no right to begin contratabular proceedings, it goes without

[1] [For *invenit* read *invenitur*.—Tr.] [2] [*qūo*, i.e. *quomodo*.—Tr. [3] [For *addita* read *adita*.—Tr.

saying that in the will another person had been made heir to the civilian possessions. For there would be no need for a patron to begin contratabular action in a case of intestate succession[a]—nor yet, as a matter of fact, in a case of succession by will, provided that the inheritance was not yet taken up. So indicated in the passage last cited; and this is stated also by the glossator on *Digest* XXXVIII. ii. 42, § 1.

[a] *Dig.* XXXVIII. ii. 3, § 5.

Hence Titius did not come into the military possessions for which he was named by right of intestate succession; and the civilian property, which was left pendent by the other heir's refusal to accept, did not pass to Titius by right of accretion, but to the soldier's legal heir. So that law gives no support at all to the claim that a person forbidden to take property by right of accretion is not for that reason to be regarded as hindered from inheriting by intestate succession.

However, if this Titius had been a person who would otherwise have come into the estate by intestate succession in case another person named heir to the civilian possessions had refused them, even though Titius should not have taken over this remainder by right of accretion, perhaps he would yet have acquired it by right of intestate succession. For in regard to the civilian possessions, the testator meant to give the preference to the heir named; but if the latter declined, there would no longer be any reason why the common law should not enter, and the property be taken up by intestate succession.

Again, *Digest*, XXXVIII. ii. 42, § 1 shows (as I have said above) [74'] that it makes no difference whether appointment is for a specific or for a rather general thing (note the words there: 'as if they had received[1] shares of the same inheritance'). And on the same passage there is also a gloss which makes a distinction according as parts of the same inheritance are bequeathed, or a certain sort of conglomeration of two parts conceived of as existent in the case of the estate of the deceased soldier.

Touching a soldier's will, another point needs to be noticed regarding the matter of the right of accretion, namely, that it fails, not merely between heirs named to different properties (as is the case in *Digest*, XXIX. i. 17, § 1 and XXXVIII. ii. 42, § 1), but also between joint heirs named without differentiation, in case one of them declines to inherit; unless it appears that the deceased willed otherwise. So according to the unique passage in *Digest*, XXIX. i. 37, where it is far better shown that in the case of a soldier's will the claim to intestate succession is stronger than the right of accretion.

A soldier may also assign an inheritance on condition and for a 19 definite time, later recalling and assigning it directly to another person;[b] and, in case he so names no one, after the time has run out or the condition has ceased to be, his lawful heirs will succeed to the inheritance.[c]

[b] *Dig.* XXIX. i. 5, § 4.

[c] *Dig.* XXIX. i. 41, at the beginning.

[1] [For *accepisset* read *accepissent*.—Tr.]

20 It is among the soldier's privileges, too, that his will is not broken by the subsequent birth of a son, if the father is inclined to prefer the person already named as his heir, rather than the son[a]—even though his thought and wish are general in character. (Hence the law last cited is commonly quoted in support of the principle that general intent suffices in regard to a right which any one is setting aside, except in cases where a special nullification is called for. This point is considered at length by Felinus.[b]) As a matter of fact, even if this was not the father's intent in the beginning, but a second thought arising after the birth of a son and the breaking of the will, the latter will resume its validity.[c]

21 Again, it is among the privileges that a soldier makes a valid will, even though uncertain of his status; so *Digest*, XXIX. i. 11, § 2 (the case of a civilian is different, as is noted there); but this applies merely to[1] those possessions, and those only, which the testator knew to be his. For, suppose that he believed his father to be still living, though in reality he was dead; then by no means will the heir of the son succeed to the father's property.[d] But the case would be altered if that information arrived later, and the testator's intent remained unchanged; so, too, even if he should die after becoming a veteran.[e] This privilege is discussed by Baldus.[f]

22 And in revoking a will there are the same privileges as in executing it.[g] And this is reasonable; for 'Nothing is so natural', &c.[h] Moreover, the soldier's privilege is here so elastic that even frequent changes are permitted (i.e. naming an heir, cancelling the name, and again restoring it); so that it becomes simply a question of his intention.[i] And not even the intervening [75] birth of a son interferes with this.[j]

23 In fact, to such a degree are soldiers favoured in the making of wills that even a testament executed by a civilian in the military fashion will be valid, if later he dies in the service; so *Digest*, XXIX. i. 15, § 2, where Baldus comments that by reason of the very fact that he makes no change, the man indicates approval of the will. But it needs to be proved that this was his intent at the time when he was in the service;[k] for although a will made before entering the service could be called a soldier's will, still it is not a will made by a soldier.

24 It is also among the privileges that a soldier may leave at his death two wills, separately executed, and both valid, whether he desires the first to hold under the law of *fideicommissum*, or directly. In fact by the new disposition he may elevate codicils previously executed to the rank of a will appointing an heir directly—provided, however, that it is clear that this was his intent; all of which is shown by *Digest*, XXIX. i. 19. Again, he may order that these same codicils hold immediately and directly, and that they constitute a will.[l]

I think that we should also rate among the privileges a fact which

[a] *Dig.* XXIX. i. 7.

[b] *On Decretals* ii. 12, col. 4.

[c] *Dig.* XXIX. i. 33, § 2, near end; and *ibid.*, 9.

[d] *Dig.* XXIX. i. 11, at end, and 12.

[e] *Dig.* XXIX. i. 13 and 14, at the beginning.

[f] *On Code* I. ii. 1, qu. 14.

[g] *Dig.* XXIX. i. 15, § 1.

[h] [See *Dig.* L. xvii. 35.]

[i] *Dig.* XXIX. i, 15, § 1.

[j] *Dig.* XXIX. i. 27.

[k] *Dig.* XXIX. i. 20 and 25, § 1.

[l] *Dig.* XXIX. i. 36, at the beginning.

[1] [For *quo ad* read *quoad*.—ED.]

I have already noted above, namely that between two heirs, even though named on equal terms, there is no room for the right of accretion in case one of them declines to inherit (so *Digest*, XXIX. i. 37, though the Doctors there interpret otherwise).

Again, it is among the privileges that, even on the basis of an 25
unfinished testament, a previous will is cancelled though regularly executed under either the common or the military law.[a] But there is this difference[1] between a previous will executed under the civil law and one made under the special law, that the former is not cancelled by a subsequent unfinished will made after discharge from the service and within the year immediately following, whereas the latter is annulled, even if the unfinished will is executed in the year following discharge; so according to *Digest*, XXIX. i. 34, latter part, and 35. (Hence these laws are often cited as proof that a special law is more easily set aside than the common[2] law.)

[a] See *Dig.* XXIX. i. 34.

We can cite the closing words of *Digest*, XXIX. i. 35 in support of 26
another point also, namely, that a soldier may make his will at long intervals and on many different days—which does not hold of a civilian; and this will be rated among the privileges.[b] But the Doctors understand *Digest*, XXIX. i. 35 otherwise; for Angelus there says that a person who makes testamentary disposition on different days is rated as making different wills; hence the will last executed will have precedence. But I do not see how this concerns a soldier's will; for the same thing would be true of the will of a civilian. Hence we shall do better to understand the words of the *Digest* reference to mean: 'he who writes at length on different days seems oft to be making his will,' just as I have explained above.

[b] *Dig.* XXVIII. i. 21, § 3; *Code*, VI. xxiii. 28.

For it is one thing to say that a will is often in the making (*fieri*), i.e. that it is being brought to completion, and quite another to say that many wills are made—[75′] just as it is one thing to write at length (*plura*) and another to write repeatedly (*pluries*), the former perhaps referring to various sections, whereas the latter would mean that several wills are written.

In the matter of making wills, privilege is accorded not only to the 27
soldiers themselves, but also to their attendants and others who[3] follow the camp, if they too make wills while in the enemy's country; for they also will execute their wills under the military law, as is stated in *Digest*, XXIX. i. 44. (Baldus, however, seems to have missed the point here[c] in interpreting 'in the enemy's country' (*in hostico*) to mean 'in the hands of the enemy'. For a person in such plight would be a slave of the enemy and incapacitated for making a will, whether he was a soldier, or anything else you please.[d])

[c] *Ibid.*, *Summarium.*

[d] *Dig.* XLIX. xv. 12, § 5.

[1] [*differunt* written carelessly for *differt*.—Tr.]
[2] [*cõi*, i.e. *communi*.—Tr.]
[3] [For *quòd* read *qui*.—Tr.]

Hence, at the time the Emperor had an army in Germany or in the Parthian country—or also when, in our day, the Emperor Charles was in Tunis and Algiers, all who were in their camps had the privilege of making a will under this law (and the same thing is said in *Digest*, XXXVII. xiii. 1). Again, Baldus[a] makes the broader statement (to use his own words) that the very armour-bearers and followers of soldiers—if they are essential to the maintenance of the latters' standing—enjoy the privileges of masters and soldiers.

[a] *On Code* II. li. 1.

28 But as to the question whether a person selected for the service, but not yet formally enrolled, may make a will under military law, the rulings seem various. For in *Digest*, XXIX. i. 42 it is stated that such procedure is not permissible, even though the man is an accepted recruit and is already travelling at state expense; whereas in the law immediately following[b] it is said that a *filiusfamilias*, who is raised to knighthood and kept in attendance upon the Emperor under orders to take the belt at once, may make a will covering his military acquisitions. (Hence a glossator comments on that passage to the effect that what is soon to be done is counted as already done.)

[b] *Dig.* XXIX. i. 43.

A possible explanation is that a new recruit is not so near to instatement as a man who has already been passed and ordered to be enrolled. (This is the explanation also of *Digest*, XXXVII. xiii. 1, § 2, where it is stated that a soldier transferred from one division to another may make his will under the military law, even though at the time he has been released from one division and has not yet[1] been incorporated in the other.)

Another solution is that a man chosen to enter the service is still subject to rejection, if in the course of the training he is found to be unsatisfactory.[c] This could not be said of a man whom the Emperor has ordered to take the belt.

[c] Vegetius, *Rei Militaris Instituta*, I. viii.

29 It is also a privilege of the soldier that, when under sentence of death, he may dispose of his military acquisitions by will, but of those only, and only under the military law.[d] And in addition to these two conditions mentioned, the privilege is subject to a proviso, namely, if the soldier has secured such concession from the judge, or it has been provided for in his sentence.[e] Furthermore, the privilege applies only to men condemned for military offences [**76**] and not for crime in general.[f]

[d] *Dig.* XXIX. i. 11, at the beginning; XXVIII. iii. 6, § 6.
[e] *Dig.* XXIV. i. 32, § 8.
[f] *Dig.* XXVIII. iii. 6, § 6; *Code*, VI. xxi. 13; *Dig.* XXXVIII. xii. 1.

In fact, even in regard to military offences there is the further reservation that the privilege does not hold if the oath of loyalty has been broken; so *Digest*, XXIX. i. 11, where the brothers Baldus and Angelus comment to the effect that persons condemned for breaking faith forfeit the right to execute a will. This, however, perhaps has another bearing; for I should think it decidedly one thing (and a

[1] [*nundum*, i.e. *nondum*.—ED.]

peculiar kind of disloyalty) to break the military oath, and quite another to break faith elsewhere. (The military oath is discussed by a gloss on *Digest* III. ii. 2, § 3, and I have treated of it above.)

There is also another privilege, similar to the above, namely that 30
in the matter of the military acquisitions of a condemned soldier, even though he has failed to make a will, the next of kin inherit, up to the fifth degree, taking precedence over the claims of the fiscus. So *Digest*, XXXVIII. xii. 1 and 2, where a glossator comments—and at greater length on *Code* VI. xxi. 13.

It is reckoned among the privileges also that a soldier may name an exiled person as his heir[a]—a thing not true of a civilian.[b] But if the soldier dies more than a year after discharge, such appointment becomes void, as is stated only in *Digest*, XXVIII. iii. 7.

[a] *Dig.* XXIX. i. 13, § 1 ff.; XXXII. 7, § 1.

[b] *Code*, VI. xxiv. 1.

Again, although the common law requires that three points of time be looked into in order to determine whether an heir is eligible to succeed or not (namely, the time of appointment, the time of death, and the time of taking up the inheritance),[c] for the heir of a soldier it suffices that he have the capacity at the time of death; so *Digest*, XXIX. i. 13, § 2. And in section 4 of the same law it is stated that by military privilege an emancipation through a *fideicommissum* becomes direct, whereas in the case of a civilian's will there is a reservation.[d]

[c] *Dig.* XXVIII. v. 50, § 1.

[d] So *Dig.* XXIX. i. 14.

Once more, it was customary to rate among the military privileges 31
the fact that in the case of soldiers' wills there was no subtraction under the Falcidian and Trebellian enactments. (However, this was afterwards changed by more recent laws, as I shall point out below.)

One thing, however, is to be particularly noted in this matter of 32
military wills, namely, that a testament holds only in case the testator dies in the service, or within the year following discharge.[e]

[e] *Inst.* II. xi, § 3.

But I would not have it thought that in other particulars it makes 33
no difference whether a soldier executes a will or codicils while in the service, or whether he does so within the year following discharge. For those which are executed in the service are not subject to the Trebellian or Falcidian deductions, according to the old-time law, but the others are so subject even under that law. This applies also to a *fideicommissum*.[f]

[f] *Dig.* XXXV. ii. 92.

Moreover, no privileges will apply to wills made within the year 34
after retirement, unless the discharge is honourable—not otherwise.[g]

[g] *Code*, VI. xxi. 5; *Dig.* XXIX. i. 26.

Again, in the third place, touching this year and the matter of discharge, I believe that we should be careful to restrict what has been said above exclusively to those soldiers who are retired by rule[h] [**76′**] (I mean that we should understand the word *mitti*, not as the gloss here[i] explains, i.e. 'be relieved', but as referring to soldiers who receive dismissal, i.e. discharge, from their general, that they may quit the service, with intent to serve no more thereafter—not extending the application

[h] *Dig.* XXIX. i. 21.

[i] *Ibid.*

to tribunes, prefects, and others of that class, who are not retired by rule, but who look to the Emperor for their successors in service[a]).

[a] Same law.

Perhaps it would be better in this day, too, if the early practice were followed, rather than that enlistment and discharge be left as a matter of caprice with the commander. For (to touch on this point in passing) it was not permissible at that time and under those regulations to enlist for the service at random, as I have already pointed out above,[b] nor could the service be left in such fashion. Rather, the men were formally discharged (or, if they were of high rank, they awaited the appointment of successors by the Emperor), and after completing their campaigns they were mustered out.

[b] Part I, chap. 6.

35 For there were recognized periods of service at the end of which, as veterans who had served their time, they were released from the 36 military oath and rewarded.[c] Hence also we read in Cornelius Tacitus[d] that at the time of the Pannonian mutiny, the Roman soldiers complained that they were held to thirty or forty campaigns, and that then they were carried off to far-away countries, where, under the name of 'fields', they were rewarded with reeking swamps and unreclaimed hills; also that their souls and bodies were held at ten *asses* per day. The mutiny was quelled at length by the arrangement and concession that, among other things, those should be mustered out who had served twenty campaigns (i.e. who had been in the army twenty years), and that those who had served in sixteen campaigns should still be held under the colours, free from all other obligation than that of driving 37 back an enemy. So Tacitus. And from this you see also what the difference is between discharge and mustering out.

[c] See text and gloss on *Dig.* III. ii. 2, § 2; *Dig.* XXVII. i. 8.

[d] *Annals*, I [xvii].

## CHAPTER II

### ON THE DENARIUS AND THE PAY OF THE ROMAN SOLDIER

### SYNOPSIS

1 What the *denarius* is.
2 What are *as* and *asses*. And see number 5.
3 The *sestertius*.
4 The *denariolus*[1] of Turin the same as the *quatrinus* of Milan.
[5 See number 2.]
6 The *denarius* is a drachm of silver.
7 The *denarii* in ancient times were of various weights.

But to touch incidentally upon another point suggested by those words of Tacitus 'that their lives were rated[2] at ten *asses* per day', which, without doubt, we should understand as referring to the pay given to the soldiers by the state: they are thus explained by [77]

[1] [This reading is required by the text under nos. 3 and 4.—Tr.]
[2] [For *extimari* read *aestimari*.—Tr.]

Alciati, who says, 'This passage shows that the *denarius* amounted to ten *asses* of copper, which was the daily wage of the soldier. The same amount is received by the German infantry at the present time, i.e. three crowns per month'. 1

This view is supported[1] by a certain German, who has written a treatise on the weights and measures of the ancients, together with certain financial[2] terms. 'Ten *denarii*', he states, 'are equal to one *coronatus*, which we call a crown'.

[a] In a work called *Breviarium Assis.*

And this is in line with the statement of Budé,[a] who says: 'Two and a half *asses* make a *sestertius*,[3] i.e. one *Caroleus*, or one-half a *denariolus*'. And again: 'The *denarius* equals four *sestertii*, i.e. four *Carolei*, or two *denarioli* of Turin.' 2 3

Now this *denariolus* is what the people of Milan call a *quatrinus*. For the *Caroleus*, as it is called in changing French money into German, equals ten *denarioli* of Turin; and the *Caroleus* which we call *parpagliola* equals ten *quatrini* of Milan, i.e. two and a half *soldi*, or two of our *grossi* of Piedmont.[4] 4

In this way[5] we determine that the *as* of copper was to the Romans what the *soldo* is to the people of Milan. Those ten *asses* per diem, then, will be about the same as the Spanish coin which to-day we call the *real*. Anticipating Budé and others above-mentioned, this had been shown by Leonardus de Portis, a jurisconsult of Vicenza, in a little work[b] in which he says in several places that a *sestertius* is the fourth part of a *denarius*, and that the *denarius* is a drachm of silver; hence he proceeds: 'It is quite clear that ten *asses* make a *denarius*, and that thirty ancient *denarii* equal thirty *Julii*, or thirty-six *Marcelli*, or, again, three *aurei* of our day.' 5 6

[b] *De Sestertio, Pecuniis, Ponderibus et Mensuris Antiquis.*

In regard to the *as* and the *sestertius*, the same view is held by Denis Lambin, a recent commentator on Horace. 'Originally', he says,[c] 'the *as* was a copper[6] coin of a pound's weight, and it was designated by the letter L[7], its value being that of four of our Turinian pieces, i.e. one Venetian *marchetus*' (here, however, he is mistaken, for the *marchetus* is worth one-fourth less than the *soldo*).—'And so', says he, 'the *sestertius*, being equal to two and a half *asses*, was designated by LL and S[8] by the ancients (i.e. LL S), not by HS, as is done incorrectly to-day'. And at another point[d] he makes a similar statement.

[c] On Horace's *Satires*, II. iii [156].

[d] On Horace's *Epistles*, I. ii [II. ii. 27].

Therefore I am surprised that all agree on this, that ten *asses* are the same as a *denarius*, as Alciati assumes on the basis of the above cited quotation from Tacitus, though in the same passage that writer adds: 'Nor would there be any relief, unless the service should be entered

[1] [For *ad stipidatur* read *adstipulatur*.—Tr.]
[2] [For *numerariae* read *nummariae*.—Tr.]
[3] [For *estertiū* read *sestertium*.—Tr.]
[4] [The argument is valid only if the two *Careoli* are equated.—Tr.]
[5] [i.e. by combining equations in nos. 3 and 4.—Tr.]
[6] [For *ęrens* read *aereus*.—Tr.]
[7] [i.e. *libralis* ('of a pound's weight').—Tr.]
[8] [i.e. *semis* ('a half').—Tr.]

under well-defined conditions, so that the pay should be a *denarius* a day, and the sixteenth year of service should bring discharge,' these being the demands of the soldiers in that mutiny. If, then, they were demanding that the ten *asses* per day be changed to a *denarius*, it at once follows that the *denarius* was worth somewhat more. Either, therefore, that passage in Tacitus is corrupt, [77′] or, as I have said, the *denarius* was of greater worth.[1]

7 This is gathered also from a small work of Georgius Agricola,[a] who says on this topic that originally the *denarius* was equal to ten *asses*, whence its name; and he adds: 'as the Greeks have a silver coin (the *drachma*), so the Romans have the *denarius*.' So much for him.

Again, the Spaniard Didacus[b] states that the *denarius* weighed a drachm, his words being as follows: 'The *denarius* is the eighth part of an ounce'. And he adds, 'If we should compare the *denarius* with the silver coins of Castile, we shall find the Roman *denarius* equal in weight to the silver *real* which the jewellers recognize, this being one-eighth heavier than the current coin'. He says, further: 'Some have thought that the *denarius* differs from the *drachma* in that the *denarius* is the seventh part of an ounce, whereas the *drachma* is the eighth part.' And again he states: 'It is absolutely certain that the *denarius* was not always of the same weight', demonstrating that the *denarius* of Agrippa outweighs the Attic *drachma* by a half. And once more he adds: 'for after the time of the Emperor Claudius they coined ninety-six *denarii* to the pound, making them thus of a drachm's weight'.

Therefore, since that Pannonian mutiny of which Tacitus writes happened in the reign of Tiberius (and, accordingly, before the time of Claudius), we may assume that the *denarius* in the time of Tiberius was more than ten *asses* and more than a drachm, and hence that there was reason in the demand of the soldiers that, in place of the ten *asses* which were the daily pay (i.e. a *real* or thereabouts), they should receive a *denarius*.

And if, as Didacus believes, this *denarius* was equal to the one which he saw with the stamp of Agrippa, it was then a little less than the fifth part of an ounce; such a *denarius* would approximately equal sixteen *soldi* of Milan,[2] or about fourteen *grossi* of ours, which used to be the daily wage of a private soldier. But if you take it as referring to the *denarius* which is the seventh part of an ounce, there will be a proportional decrease in the estimate I have made; and in the common currency it will be worth about thirteen *soldi* of Milan, and approximately twelve *grossi* of Asti. Farther on also I shall have something to say of the pay of soldiers.

[a] *De Mensuris et Ponderibus Romanorum atque Graecorum*, Bk. IV.

[b] In a work called *Veterum Collatio Numismatum*, chap. ii.

[1] [This is usually credited to the depreciation of copper. For another explanation see the text under no. 7.—Tr.]

[2] For [*Mediolanense* read *Mediolanenses*.—Tr.]

## CHAPTER III

### ONCE MORE ON THE PRIVILEGES OF SOLDIERS

### SYNOPSIS

1 Boys advanced to military offices.
2 A courtesan does not inherit by a soldier's will.
3 A soldier is excused from guardianship, except in the case of the child of another soldier.
4 Ignorance of the law condoned in soldiers. But understand this as explained here and in numerous following paragraphs.
4 Non-application[1] of the Trebellian and Falcidian enactments to a soldier's will.
5 [78] A soldier who does not pay his tax, or who fails to list an estate, does not lose his property.
6 *Code*, V. iv. 21 explained in a new way.
7 Common (*caligati*) soldiers; why so called.
8 A *praescriptio* [*longi temporis*] does not operate against men in the service.
9 A soldier is fined only to the extent of his resources.
10 A soldier cannot be condemned to death without consulting the Emperor.
10 A soldier may press an abandoned suit.
11 Whether the pay of a captured soldier continues.
11 Whether the pay of a soldier on leave continues.
12 Within the year following dismissal a soldier may be restored *in integrum* regardless of developments during the period of service.
13 A soldier does not suffer as a result of a court order;
14 And if he does suffer, he recovers his property when the price has been paid.
15 The incidental is given more attention than the inherent.
16 Soldiers have privilege of court.
17 Who are qualified judges of soldiers.
18 The treasurer of the Emperor ranks among the highest officials.
19 Higher officers of the Emperors are not responsible to the governors of provinces, but to the Emperor alone.
20 Dukes, treasurers, and others of this grade, even after completing their term of office, enjoy the exemption that in criminal cases they are answerable only to the Emperor.
21 Persons of high standing are not sentenced without consulting the Emperor.
22 A soldier not enrolled in the register has no privilege.
23 Guilds do not enjoy the ancient privileges of corporations.
24 Sentence cannot be executed at the expense of a soldier's pay.
25 Soldiers are not liable for transportation services.
26 Whether soldiers are required to provide entertainment, if they possess a residence.
27 An agreement to inherit from one another is valid between soldiers.
28 The squadron commander may contract for his whole troop.
29 Things bought with a soldier's money become his.
30 A soldier cannot be forced to give evidence against his will.
31 A soldier may not be sentenced to the mines;
32 Nor yet put to torture;
33 Nor hanged.
33 The punishment of hanging more drastic than beheading.
34 Doctors have the privileges of soldiers.
34[2] Which of the military privileges doctors enjoy.
35 Sons of soldiers enjoy the exemptions of the father as regards torture and other things above mentioned.
36 Decurions, too, are exempt from the above named punishments.

[1] [For *habet* read *habent*.—Ed.]
[2] [The text required that this number be changed from the position it occupies in the Latin.—Ed.

37 Whether the soldiers of our day are entitled to the ancient privileges.
37 A sovereign lawfully makes gifts to a mistress, though the same is not true of soldiers of the lower grades.
38 [78′] What privileges are enjoyed by honorary soldiers.
39 An honorary soldier engaging in sordid transactions loses privilege.
40 Privilege does not hold in the case of a person who is unsuited.
41 'Gilded' knights[1] are not really soldiers.
42 'Gilded' knights, who owe their appointment to money, do not enjoy privilege.

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But, to return to the beaten track, one last thing we must recognize in regard to the testamentary aspect of the soldier's privilege, namely that, although in the ancient days the office of first centurion or tribune and other like positions were sometimes assigned to unqualified persons—for the familiar rule of *Code*, I. xiv. 6 has always been
1 operative, so that these positions fell even to children[a]—such a minor, however, was not allowed to make a will under the common law nor yet by the military law, on the principle that privilege should not be extended beyond the intent of him who bestowed it, and to avoid turning into a mischief what was granted for a proper end; and, lastly, not to open the way for frauds, in view of the unsettled purposes of that time of life. On these grounds the Emperor Justinian emended the ancient laws which ordered otherwise, as is stated in *Code*, VI. xxi. 18. And in general, reader, restrict the broad testamentary privilege of the soldier to matters honourable and proper.

2 For if a soldier should name as his heir a courtesan or concubine, she would not inherit; and, further, the inheritance would fall to the fiscus, which would claim it as against an unworthy heir—even though the soldier died in the service or within a year after discharge.[b]

Aside from the testamentary privileges, soldiers had many others
3 also. For they were excused from duty as guardians, even though already discharged from the service (unless the discharge was dishonourable[c])—except in cases where the ward was the son of a soldier (when it would be unseemly to reject the son of a comrade, the fairer thing being to waive privilege in dealings between privileged persons[d]). This excuse, however, does not apply to all discharged soldiers, but only to veterans who have served their time;[e] though the city[3] cohorts enjoyed this privilege when dismissed for any necessary reason whatsoever.[f]

[4] It is also a privilege of soldiers that their ignorance of the law is condoned, inasmuch as it is more properly their business to understand arms.[g] But this does not apply to crimes;[h] for nature herself admonishes them that what [79] you would not like done to yourself you should not do to others. In his *Life of the Emperor Alexander*, Lampridius

[a] See *Dig.* XXVII. i. 8, § 7;[2] *Code*, VI. xxi. 18.

[b] *Dig.* XXXIV. ix. 14.

[c] *Dig.* XXVII. i. 8.

[d] *Ibid.*

[e] *Ibid.*, § 1.

[f] *Ibid.*, § 5.

[g] *Dig.* XXII. vi. 9, § 1; *Code*, VI. xxx. 22, at the beginning.

[h] *Dig.* XLVIII. v. 12, at the beginning, second ruling.

[1] [*Equites aurati*, knights who wore golden spurs, i.e. who did not win them in battle.—Ed.]

[2] [Belli's citation (l. *sed et si miles.* §, *iam autem.* ff. *de excu. tu.*) probably designates this law. However (possibly owing to a more recent translation of the law from the Greek), the reference as given does not fit with modern editions of the *Digest*. There seems to be some confusion also in the citation of the title. Tr.]

[3] [For *urbano* read *urbanae*.—Tr.]

says[a] that these words were ever on the Emperor's lips, though he did not profess the Christian religion and piety. And because a soldier had raped the wife of his host, Albinus had two trees bent down, bound the man's feet to them, and caused him to be rent asunder. So Totila, King of the Goths, barbarian though he was, put to death an armour-bearer of his who had raped a maiden, as Tiraqueau[b] tells us, quoting from Procopius. But at the present time, how few there are—even common and ordinary soldiers—who do not have an eye upon the mother or daughter of the family, plotting to defile her, and, though guests, leaving no stone unturned until the thing is accomplished!

Furthermore, this privilege of ignorance of the law is much restricted by Baldus,[c] who says that it applies only to[1] the subtleties and fine points of law, adding that in regard to deliberate acts the soldier is no more favoured than other people and that he has no greater consideration shown him, thus assuming that the soldier is to be held responsible, if he does not take into account things that should have been considered, and if he neglects to consult persons better informed. But I think that this limits the privilege too narrowly; for even lawyers are excused if they fail properly to understand points involving subtleties of law, as Baldus himself admits.[d]

In an enumeration of the cases where military privileges lapse, Oldendorp[e] also says that soldiers are not excused when wilfully and knowingly they fail to recognize fact or law (as when they have been advised by experts), because in such a case they are not in trouble as a result of ignorance. This squares very well with the *Consilium* of Baldus above cited, in regard to which I am in doubt for the additional reason also that soldiers may excusably be in ignorance as to the correctness of opinions rendered by an expert.

It is a soldier's privilege, too, that if he incautiously takes up an inheritance, he is not obligated beyond the assets of the same; so *Code*, VI. xxx. 22, near the beginning, with repetition in section 16. There, however, a gloss states that this has been repealed by a later law.[f]

It adds, also, that if the inventory is not completed, the man will [4] lose the portion covered by the Falcidian enactment (but not so, if he completes it), even though the will be a soldier's. (This confirms what I have said above concerning privilege as to the portions covered by the Falcidian and Trebellian enactments; and see Bartolus[g] also.) However, some understand the passage in the *Authenticum*[h] as referring to a soldier named as heir, and not also to the soldier making a will, and this the gloss there disapproves.

I should think it both better and more reasonable to understand the situation in that other way, i.e. not of a soldier making a will, but of one who takes it up—whose ignorance of the protection and benefit

[a] [*Alexander Severus*, li].

[b] *De Legibus Connubialibus*, XIII. xiii.

[c] *Consilia*, I. 263 (*Verba instrumenti*), no. 5.

[d] *On Feuds* II. liii, § 4, no. 4.

[e] *De Iure Militari*, no. 2.

[f] So also on *Authent.* i. 4, § 2, word *militari*.

[g] *On Dig.* XXXVI. i. 1, § 6.

[h] i. 4, § 2.

[1] [For *quo ad* read *quoad*.—Ed.]

arising from completing the inventory ought to be condoned. This view is favoured by the wording of the passage cited:[a] 'That all wills whether by word of mouth or in writing shall thus conform, whether [79'] the individual be a civilian or a soldier'—expressions that have to do with the making of a will and not of an inventory. However, we should not reject the gloss and the commonly accepted view, especially as it is stated in that passage: 'For we impose this law upon all men generally'. Yet Aretinus[b] says that this gloss never convinced him.

[a] *Authent.* i. 4, § 2.

[b] *Consilium* 12, col. 1.

5 Likewise, if a soldier does not make a declaration or pay a tax, his property is not confiscated.[c] And this privilege may be extended to include the declaration[1] covering immovables, when there is renewal of the census, which some call 'registration', and others 'assessment'.[2]

[c] *Code*, IV. lxi. 3.

6 From the man in the ranks up to a member of the bodyguard, it is a soldier's privilege to engage in matrimony without any formalities whatsoever, provided that the wife taken is free born; so *Code*, V. iv. 21.

6 But as for the Doctors' comment there[d] that, without distinction, from lowest to highest, soldiers may take a wife without any formality, our interpretation should be very different. No doubt it is allowable for soldiers thus to take a wife, from the common soldier (which is the lowest rank in the service) up to a member of the bodyguard (which is not the highest grade, but intermediate). But, from the grade of member of the bodyguard upward, this is not allowed. And though the Doctors fail so to state, the proof is found in *Authenticum*, cxvii. 6, where there is cited a law of Constantine, according to which unions with common women were forbidden to some men in the service. This law Justinian there emends, allowing the mating of women of any sort (provided they are free born) with military men, except such as hold high office, in which case he directs that dower contracts be executed.[e] (Of bodyguards I had something to say above.[f] And perhaps the several departments had each their own bodyguards, as they had also their special *primicerii*).

[d] *Code*, V. iv. 21.

[e] So ordered also in *Authent.* lxxxix. 8 ff.

[f] Part I, chap. x.

7 The rank and file (*caligati*) were named from the boot (*caliga*) which the common soldiers wore. It was a sort of foot-wear such as we use to-day to protect the lower leg and foot. So we learn from Tacitus;[g] for, speaking of Gaius, the son of Germanicus, who afterward succeeded Tiberius, he says: 'In his infancy he was brought up in the soldiers' mess, and they called him "Little Boots" (*Caligula*), making use of a military word, because, with a view to winning the goodwill of the rank and file, he generally appeared in that kind of foot-covering.'

[g] [*Annals*], I [xli. 3].

Therefore, as you see, this was the style used by the rank and file. And the same can be shown also by another passage from Tacitus,[h] who says of the afore mentioned Caligula: 'Her son[3] she carries about

[h] [*Annals*, I. lxix. 5.]

[1] [For *professione* read *professionem*.—Tr.] [2] [For *castra* read *cadastra*.—Tr.]
[3] [For *filiâ* read *filium*. The mother's name was Agrippina.—Tr.]

in the dress of a common soldier, and wishes him to be called *Caligula*.' Thus mused the resentful Tiberius.

Again, as long as a man is in the service, the years do not count 8
against him in the matter of a *praescriptio longi*[1] *temporis*.[a] And this applies also to the attendants of soldiers and to others whose presence in camp is necessary, such as surgeons and physicians.[b]

It is also among the soldiers' privileges that by sentence they are 9
not mulcted [**80**] beyond their resources, a deduction even being made to save them from want.[c] But this does not hold, if the debt in question was incurred in a dishonourable way (e.g. while roving at large), or if the soldier was dishonourably discharged.[d] The same privilege is enjoyed also by soldiers of the civil service and of the court.

It seems to me that another privilege of theirs may be gathered 10
from *Digest*, XLVIII. iii. 9, namely, that not even the commander of the army is allowed to execute culprits before consulting the Emperor—except in the case of the rank and file and the lowest grade. For why would there be in that law the pregnant statement that in the case of the rank and file he has even this power, if it were not true that he was under restraint as regards[2] others of higher grade in the service? This opinion is supported by what is said in *Digest*, XLIX. xvi. 12, § 2, namely that it is the duty of the tribunes not to exceed the bounds of their authority in punishing the soldiers. And still more in point is what we read in Tacitus[e] regarding that mutiny of which I have already spoken above several times, namely that Manius Ennius,[3] prefect of the camp (who was in command at that time in the absence of the general), quelled the mutiny that had broken out[4] by putting to death two soldiers—'acting on sound principles', says Tacitus, 'rather than with conceded right'.

But at the present time, to say nothing of the commanding general, and not to mention legion commanders (who seem to me to be about what we call 'colonels'[5]), the very centurions or captains (as they are commonly called) for the most trifling causes fly out like madmen upon the soldiers, observing absolutely no judicial method or military procedure and rules. However, we may say with Cino: 'let that pass with their other sins'. (On the legion commander and prefect of the camp, see Vegetius.[f])

It is a further privilege that if sentence is passed against a minor, 10
and his guardian appeals without following up the case, and the minor meanwhile attains his majority in the service, the latter will have the right to follow up that appeal on the conclusion of his campaigns, however late that may be—but without suing the guardian for neglect of duty.[g]

[a] *Code*, VII. xxxv. 8.

[b] *Code*, VII. xxxv. 2.

[c] *Dig.* XLII. i. 6.

[d] Gloss, *ibid.*

[e] [*Annals*, I. xxxviii. 1 ff.].

[f] *Rei Militaris Instituta*, II. ix and x.

[g] *Dig.* XLIX. i. 24, § 1.

[1] [*longevo*, i.e. *longaevo*.—Tr.]
[2] [For *quo ad* read *quoad*.—Ed.]
[3] [For *Minutium* read *M'. Ennium*.—Tr.]
[4] [*ceptam*, i.e. *coeptam*.—Tr.]
[5] [For *colonella* probably *colonellos* should be read.—Tr.]

11 Again, it is a soldier's privilege that all the while he may be in captivity and in the hands of the enemy, his time is counted just as if he were serving. Hence, if in that period the time of his service runs out, he will receive emoluments along with the other veterans.[a]

But as to whether his pay meanwhile continues for this period, the rulings seem to have been various. For in *Digest*, XLIX. xvi. 15, it is stated that such pay is due; but the reverse is said in *Code*, XII. xxxv. 1. A gloss on the latter law offers the explanation that if the man is taken from a strong position, i.e. with due warning, and so through his own carelessness, the *Code* reference applies; but if he is taken by surprise, and while on the march or delivering a letter, then the *Digest* reference is in point. This view is followed there[b] by Joannes Gutierrez.

Another explanation offered by the gloss is that one procedure is according to strict law, and the other by the Emperor's indulgence. This does not fit with *Code*, XII. xxxv. 5, where it is stated that pay is not due for the time [80′] during which a man was a deserter, even though he has been reinstated in the service by favour of the Emperor.

Perhaps, however, all these laws can otherwise be harmonized by supposing that *Code*, XII. xxxv. 1 and 5 have to do with a real deserter who by his own choice remained among the enemy, while *Digest*, XLIX. xvi. 15, refers to a person against whom the charge of desertion has been brought but not substantiated ('and it did not appear that he had been a deserter'); for if he demonstrated that he had been away on leave, it is no wonder that he received pay for that period. On the other hand, that the man had remained voluntarily among the enemy in the case supposed in *Code*, XII. xxxv. 1 is indicated by that word 'reinstated'; for what need was there for reinstatement for a man who had returned through postliminy, unless he were also guilty of some fault?

But Martinus Laudensis,[c] treating of this question, states baldly that pay is due for the time spent by a man in captivity; however, he took the other view in his treatise on war,[d] and there cites Baldus.[e]

Possibly, too, we should understand the laws as meaning that in the case of a captured soldier[1] his campaigns (i.e. the years of his service) are accumulating, but not his salary (i.e. the pay for the campaigns). For we speak of twenty and thirty *stipendia*, meaning thereby, service for twenty and thirty years.

11 Whether pay is due a soldier who is away from the colours on leave is a question raised by Baldus[f], who discusses it in full, and decides for the affirmative. Romanus[g] holds this same view, citing a passage which he says is unique.[h] And Baldus elsewhere[i] affirms without comment what I have reported above.

12 There are also other privileges of the soldier. For, however long he may have served, and whatever the lapse of time, within the year

[a] *Dig.* XLIX. xvi. 5, § 7; *ibid.* 3, § 12.

[b] *On Dig.* XLIX. xvi. 15.

[c] *De Milite*, qu. 4.

[d] *De Bello*, qu. 49.

[e] *On Code* VI. xlvi. 7.

[f] *On Code* VI. xlvi. 3, at end.

[g] *Singularia*, 448.

[h] Namely in *Code*, XII. xix. 14.

[i] *On Code* VI. xlvi. 7.

[1] [For *milite* read *militi*.—Tr.]

following discharge from the service he is restored *in integrum* as against a *praescriptio longi temporis*, and recovers his property.[a] Likewise, if not legally defended, his goods may indeed be taken possession of, but not fully transferred to his creditors.[b] Again, if creditors have disposed of a soldier's goods by right of mortgage and according to the rule of *Code*, VIII. xxxiii. 3, the man will be restored *in integrum*; so that, by paying the debt, or even the sale price (if it was less than the debt), he will recover his property.[c] But these privileges apply only if the time is spent in the service, not if it is passed at home or in ranging about.[d] 13 14

[a] *Code*, II. l. 3; II. lii. 3.
[b] *Code*, II. l. 4.
[c] *Code*, II. l. 6.
[d] *Code*, II. l. 8.

Furthermore, for restoration *in integrum*, a minor in the service reckons the time from the day of his discharge, and not from the day of coming of age.[e] 15

[e] *Code*, II. lii. 1.

(Hence you see that the incidental is given precedence over the inherent. However, the gloss and Doctors here[f] understand in a different way; and, in other situations, the inherent is given precedence over the incidental, even in the case of a soldier. For if a minor makes an agreement with his brother concerning a *fideicommissum* executed by the father, [81] relief is granted him. But this is not the case if he is of age, even though he is a soldier; for he will be held to the agreement.[g])

[f] *Ibid.*
[g] *Code*, II. iv. 11.

A soldier is also restored *in integrum* despite the passage of time allowed to lapse by the person from whom he inherits (provided, however, that the latter's claim to restoration was still good), if within the period allowed for demanding restitution he enrolled for military service; and this restoration he secures on the basis of the claim of the deceased person.[h] But I do not think this a matter of military privilege; nor yet the case of *Code*, II. lii. 4, where it is stated that the heir of a soldier, through the latter's claim, is restored despite the time which has lapsed during service. For, through the claim of the deceased, any heir is entitled to the right and action to which the dead person was entitled.

[h] *Code*, II. lii. 2.

Soldiers have also a privilege in the matter of court; for they are not prosecuted except before their proper judge in person, but with a distinction. For cases may be either criminal or civil. 16

Under the first head, the offence may be military, and then the trial will be wholly in the hands of the military judge.[i] Or the offence is common and trivial, and the disposition is the same,[j] even if remanding is required.[k]

[i] *Dig.* XLIX. xvi. 3, at the beginning.
[j] So gloss there.
[k] So text *ibid.*

If the offence is serious, the man is punished at the place where the wrong was committed, and by action of the governor of the province[l]—but with the reservation: unless the governor and the general or the military chief act together; for a special military judge is given the preference.[m] In fact, if such a judge be absent, the soldier may petition to be remanded to him. This was stated by Paolo di Castro;[n] 17

[l] *Code*, III. xv. 1.
[m] So *Code*, III. xiii. 6.
[n] On same law.

and there is support in *Digest*, XLVIII. iii. 9 and *Code*, IX. iii. 1. It is in the light of these laws that we ought to interpret the passage in *Digest*, XLVIII. ii. 22.

Indeed, that even in the case of a serious offence the soldier is remanded to his special judge is indicated in *Code*, IX. xxiv. 1, § 3. Moreover, it is stated in *Code*, I. xxix. 1 that the military chief has no jurisdiction over the provincials, nor the governor, in turn, over men in the service. Parallel with this is the statement that the military arm does not reach the concerns of civilians.[a]

[a] *Code*, IX. xxiv. 1, § 3; I. xl. 8.

But the civil cases of soldiers who are prosecuted will be handled only by their special judge, according to *Code*, III. xiii. 6. Yet I think that it might be said more naturally that, in the case of an ordinary offence committed in a province or state in which he is not serving, a soldier need not be remanded, but should be punished on the ground by the governor, or by the magistrate under whose jurisdiction the offence falls in that province or state; compare *Code*, III. xv. 1.

18 Another point is to be noted in regard to privilege in the matter of court. For prominent men, who have held the highest offices (and in particular those [**81**′] who are enumerated in *Code*, III. xxiv. 3, near the beginning, and among them the treasurer of the Emperor and the Empress)—if these, after finishing their term of office, are accused of a 19 crime, however serious, they are amenable to no other judge than the 20 Emperor himself, or to a person appointed to represent him.

21 But not even this special representative of the Emperor will have the power to sentence a convicted defendant; rather, he will notify the Emperor, who, in the exercise of his clemency, will make such disposition of the case as shall seem best to him. For with the Emperor all penalties are so much a matter of discretion that he may excuse an actual culprit. All this is found in *Code*, III. xxiv. 3, where the post-glossators comment, especially Baldus and Saliceto.

However, such representative may acquit a defendant without consulting the Emperor, thus providing that what was introduced as an honour should not become a cause of contempt.[b] (This last provision that the judge have a right only to conduct a case, and not to impose sentence, applies also in trials of defendants who hold the high offices above referred to on an honorary basis, even though they are not actually performing the functions thereof, nor at any time have exercised them.[c])

[b] *Code*, III. xxiv. 3.

[c] *Code*, III. xxiv. 3, §§ 2 and 3.

And this is a privilege that we should not forget. For if a man, who has anywhere been a general of the king, or has served as his treasurer, should return to private life and then in some province of the king commit a crime (let us say in the Kingdom of Naples), he will not be amenable to the viceroy, and may not be punished by him.[d]

[d] See *ibid.*

And this should not seem unreasonable nor unfair, not only in

view of the aftermath of office held, but also because in law many concessions are made to persons of high rank which are not allowed in the case of men of lower grade and less prominent. Compare the situation in *Digest*, XLVIII. xix. 27, §§ 1 and 2, where it is stated that if a person of note commits a crime calling for banishment, he will not be banished without consulting the Emperor. In fact, in such a situation the full conduct of the case is not in the hands of the governor; rather, after arresting and imprisoning the man, he must notify the Emperor.[a]

[a] *Dig.* XLVIII. xix. 27, at end.

Again, this privilege of court does not apply to men who are not 22
on the pay-roll; so *Code*, I. xxix. 3, where a gloss defines 'those not entered in the muster-list', i.e. in common parlance 'not enrolled'; for 'roll' and 'muster-list' are the records in which the names of the soldiers are entered.

It may also be rated among the privileges that, in case there are no legal heirs, the estates of ship-commanders, municipal officers, attachés, armourers, and all others in the service do not escheat to the fiscus, but pass to their guilds and companies.[b]

[b] See the whole of *Code* VI. lxii.

This privilege I should not venture to extend to the unions and 23
guilds of our day, be they secular or religious (e.g. of cobblers, or scholars), whatever Bartolus[c] and Baldus[d] may have said; for all the regulations of [82] *Code*, VI. lxii are of the nature of special legislation, as Saliceto with full justice there pointed out.

[c] *On Dig.* XXVIII. iii. 6, § 7.
[d] *On Code*, IV. xviii. 2, last words.

And, further, those bodies bore an official relation to the state, to which they were rendering service, and which had a claim on their joint capital. (With regard to ship-commanders, this is shown throughout the whole of *Code*, XI. ii, and in XI. iii. 2 and 3. There is mention of the attachés in *Code*, XII. lvii. 14. Likewise of the armourers; for that whole body, too, was liable for the action of any one of its members.[e]) It is not strange, therefore, that a sort of successory edict was issued in favour of the association as a whole. But these considerations do not apply to the above mentioned guilds of our time.

[e] *Code*, XI. x. 5; cf. X. xlvii. 2.

It is another privilege that a sentence pronounced against a 24
soldier does not involve his pay, if satisfaction can be secured from any other source.[f]

[f] *Code*, VII. liii. 4.

It is likewise among the privileges that whoever conspires to kill those who are serving under the Emperor is held guilty of the crime of treason. So *Code*, IX. viii. 5; but I think those words 'or of any one at all who serves us' do not include all the soldiers of the Emperor, but only those who attend him, whatever the branch of service, whether the armed or the civil.

The following, too (though the subject is unpleasant and ill-omened), may be reckoned among the privileges that the five years' period allowed for a man to bring accusation against his wife under a husband's right is not counted as in progress while he is in the service.[g]

[g] *Code*, IX. ix. 15.

25 More pleasantly, the soldier is privileged in the matter of exemp-
26 tion from transportation service and[1] the giving of entertainment. So *Digest*, L. v. 10, § 2 and *Code*, X. xlviii. 12; but what I have said of entertainment does not fit with *Digest*, L. v. 11, and these regulations seem to be contradictory. For *Digest*, L. v. 10 states that a soldier is excused from the necessity of receiving guests, and in L. v. 11 it says that not even the merit of service excuses from extending hospitality.

We might reconcile by understanding, for example, that 'merit of service' here means 'merit of past service'. Or we might suppose that some calls for entertainment are unexpected and incidental, and that to these a soldier must respond; whereas other calls are customary and routine, and he is excused. This distinction is found in a gloss,[a] which, however, is speaking of the Church; and in fact such a solution is refuted by the above cited *Digest*, L. v. 11. For that passage has to do with a routine obligation, and yet it is stated that the soldier is not excused.

[a] *On Code* I. iii. 1.

It is a better explanation, therefore, that at times this sort of service is called for without specification as to detail, and then the soldier is privileged; while at other times there is call for a specific thing, and then whoever has that thing is obliged to accept the burden. (Normally, moreover, it is a burden upon the estate.[b] And that a soldier is here immune is indicated by *Digest*, L. iv. 18, § 29.)

[b] *Dig.* L. iv. 3, § 14.

27 Again, it is a privilege of soldiers that a pact is valid [82′] regarding inheriting from one another, as is shown by the sole law on this subject, *Code*, II. iii. 19. Bartolus there observes that the case is far different among civilians. For between them agreements of this sort are under the ban, according to him;[c] and he is followed by Decio.[d]

[c] *Consilium* 70; so also 212 (*Promitto tibi et tu mihi*).
[d] *Consilia*, 225, col. 3; 236, last col. but one; 111; 555; and *On Code* II. iii. 15.

But if comrades-at-arms were to contend as to which should have the custody of a prisoner until he paid his ransom, and it was ruled that the more noble should be preferred to the others (as Tiraqueau stated[e]), the privilege of nobility is more in evidence than that of service in the army.

[e] *De Nobilitate et Iure Primogenitorae*, chap. xx, no. 177.

It is another privilege that a centurion or squadron commander
28 may make contracts for his whole squadron or company, as Angelus indicated,[f] saying that a constable may contract for his troop.

[f] *On Dig.* II. xiv. 14.

Again, there is the privilege that a soldier may interpose a peremptory exception, even during the actual execution of a sentence, though normally such procedure is not allowable.[g] (This is connected with what was said above about condoning a soldier's ignorance of the law.)

[g] *Code*, I. xviii. 1.

Furthermore, a soldier's will is not subject to challenge.[h] (This should have been listed above, among the testamentary privileges.)

[h] *Code*, III. xxviii. 24.

So, too, the soldier is privileged in the fact that a thing bought
29 with his money becomes his property, even though it was not bought in his name.[i] This opinion was rendered by Panormitanus,[j] when consulted in regard to an actual case.

[i] *Code*, III. xxxii. 8.
[j] *Consilia*, II. 94 (*In quaestione heredum*), col. 1.

[1] [For *ne ve* read *neve*.—Ed.]

Add also the enactment of *Code*, XI. iv. 2, to the effect that animals belonging to provincials may be seized to transport army supplies—as very often happens in these days. When soldiers are travelling somewhere, this is within their privilege.

And inasmuch as it was ordered by the law of the Church that Christians should use in their wars no darts or catapults (in order to reduce[1] as far as possible the number of engines of destruction and death), and the prohibition was enforced under pain of anathema;[a] this might be listed among the soldiers' privileges, since they were the first,[2] and in fact the only ones, to reap advantage from this law.

[a] *Decretals*, V. xv, sole canon.

But to-day regard is so far lacking for this rule that fire-arms of a thousand kinds are the most common and popular implements of war; as if too few avenues of death had been discovered in the course of the centuries, had not the generation of our fathers, rivalling God with his lightning, invented this means whereby, even at a single discharge, men are sent to perdition by the hundreds.

Again, though normally if a man passes money over to another without indicating his reason for so doing, in case he desires the return of the same, he is under the necessity of proving that he passed it over of his own [83] accord, or for his own convenience,[3] the case of the soldier is different. For in this matter he is classed with minors and wards, so that the other party must either restore the money or establish a valid ground for retaining it. Thus Baldus.[b]

[b] *On Dig.* XII. vi. 57, words *si autem is qui indebitam.*

Likewise, a soldier is not forced to give testimony against his will;[c] nor, when testimony is being taken, can he be called away from the colours.[d]

[c] *Dig.* XXII. v. 8.

[d] *Dig.* XXII. v. 3, § 6.

Furthermore, a judgement pronounced regarding supplies for the army cannot be appealed[e]—but with this qualification: if it is to the interest of the army that it be not appealed (not to turn into a detriment what was enacted in the soldiers' favour). So Angelus.[f]

[e] *Dig.* XLIX. v. 7.

[f] *Ibid.*

Long since I have been growing weary of this catalogue and exceedingly lengthy enumeration of privileges. However, soldiers will do well to ponder (if this little work falls into the hands of any such) the affection and care with which the Roman Emperors conserved, fostered, and looked after the advantages and benefits of, their soldiers —nay, the soldiers of every subsequent age; for, as I shall very soon go on to show, all these privileges apply to the latter also.

These, too, should render to their generals, kings, and Emperors, the same loyalty and the same service as their valiant predecessors rendered to their rulers—making them, through their valour and the spilling of their blood, to be 'lords of the world'.[4]

And now at length to bring to a close the catalogue of these privi-

[1] [For *tolerentur* read *tollerentur*.—Tr.] [2] [For *prima* probably *primi* should be read.—Tr.]
[3] [For *commoda* read *commodo*.—Tr.]
[4] [Perhaps a reminiscence of Horace, *Odes*, I. i. 6.—Tr.]

31 leges, it is, finally, to be reckoned among the special rights that soldiers may not be sentenced to the mines nor to work therein—a punishment which is not unlike a present-day sentence to the galleys. Likewise,
32 they may not be put to torture; so *Digest*, XLIX. xvi. 3, § 1, where a
33 gloss adds that they cannot be hanged[1] or subjected to other degrading punishments.

Baldus there says that this is the practice in Italy, but not in France, where the punishment of hanging is not considered so disgraceful as in Italy. This fits with the answer made by a certain philosopher to a tyrant who threatened him with this punishment:[a] 'What difference does it make whether I disintegrate in the ground or above it?'

And that soldiers are not hanged is stated again by Baldus[b]—a remark which Martinus Laudensis[c] also picks out and quotes as noteworthy, citing Bartolus on *Digest* XLVIII. xix. 28, § 4, where the latter says that this is the general rule for all nobles and for all the more wealthy and honourable of the populace. The same statement was
33 made by Panormitanus and Felinus.[d] Again, Baldus[e] says that the punishment of hanging is more drastic than that of decapitation, because the latter is instantaneous, while the other extends over considerable time and is more disgraceful. And it is for that reason, he declares, [83′] that it cannot be inflicted[2] upon soldiers. (On this matter there is a noteworthy passage not cited by the above writers, namely, *Code*, IX. xli. 8.)

34 This exemption the Doctors everywhere extend also to the soldiers of the civil service, a class to which the Doctors themselves belong, as Cino notes on *Code*, IX. xli. 8. (There Bartolus also comments, saying that in an examination he defended on this ground a praetor against whom there was a strong case calling for torture; but the praetor there was a soldier. This he repeats on *Code*, II. vii. 1.)

[34] And that Doctors are not to be tortured was stated by Romanus,[f] the contrary practice notwithstanding; and such was the opinion of Fulgosius on an actual case.[g] Bartolus[h] goes so far as to say that the persons of Doctors may not be seized, and that they may not be haled to court or otherwise harassed; consequently attendants may not search them for the carrying of arms.

(In regard to all the persons above mentioned, however, a case under the Julian Law for Treason marks an exception; for privilege avails them naught under this head.[i] So Baldus,[j] who extends the principle to certain other crimes also, e.g. to desertion; compare what I have said above.)

35 This privilege extends also to descendants of the people in question —even to great-grandchildren; thus *Code*, IX. xli. 11, which, however,

[a] [Cicero, *Tusculan Disputations*, I. 102.]
[b] *On Feuds* II xxvii, § 9, at end.
[c] *De Officialibus Dominorum*, qu. 162.
[d] *On Decretals* II. xxiv. 12.
[e] *Consilia*, I. 426, beginning: *Praetermittendum ad evidentiam.*
[f] *Singularia*, 488, beginning: *Milites.*
[g] *Consilia*, 273 (*In causa inquisitionis*).
[h] *On Code* X. liii. 6.
[i] *Code*, IX. viii. 4.
[j] *De Quaestionibus et Tormentis*, chap. i, col. 2.

[1] [Here and elsewhere 'hanging' is to be understood as including crucifixion.—Tr.]
[2] [For *inferre* read *inferri*.—Tr.]

restricts to such descendants as reach the distinction of 'most eminent' or 'most perfect', as we there gather.

It extends as well to decurions. So *Code*, IX. xli. 16 and IX. xli. 11, though Albericus there states that in their case it does not hold in actual practice. This Martinus Laudensis[a] repeats without comment. 36

[a] *De Consiliariis Principum*,[1] qu. 7.

Incidentally I raise the question whether the military privileges scattered through so many laws here brought together apply to soldiers of our time, and should be accorded to them. This question all the Doctors take up in connexion with *Code*, I. xviii. 1, and some (in particular, Alexander) on *Digest* XXVIII. vi. 15. The majority, perhaps, hold for the negative, so deciding because: 37

[*a*] our soldiers do not go through with the forms demanded by the gloss on *Digest* IV. vi. 45;

[*b*] he who has a mere name without function is not entitled to privilege (*Code*, I. ii. 9—a law which is repeated verbatim in *Code*, XI. xviii. 1, though Justinian says, in Introduction to *Code*, section 1, that he has left no superfluous laws—a claim which we find in many other places also not to be true);

[*c*] they engage in trade, contrary to the rule: 'Traders may not serve in the army';[b]

[b] [*Code*, XII] xxxiv.

[*d*] even those genuine soldiers of the ancient time lost their privileges when they were not serving, but were tarrying at home.[c] And the soldiers of our day are always tarrying at home;

[c] *Code*, II. i. 8.

[*e*] 'The occasion ceasing,' &c.;

[*f*] they are not listed in the muster-roll—contrary to *Code*, XII. liv. 5.

Further support is found in [84] *Code*, XII. lvii. 9 ('Not those who, under the specious name of military service, are pursuing gain, but those who with due care attend to the necessary work of their calling'). On these grounds, Alexander,[d] as I have said, holds it to be the common view that our soldiers do not enjoy the old-time privileges; and with this Jason agrees.[e]

[d] *On Dig.* XXVIII. vi. 15, no. 24.

[e] *On Code* I. xviii. 1, no. 7.

'Except', say they, 'that the men be not put to torture'—an exception which I fancy they made out of regard or respect for Bartolus, inasmuch as he had said that in an examination he defended that praetor of his, of whom I have already spoken.

With all due respect for the above, I believe that a distinction should be recognized:

(1) Soldiers of our day are really in actual service; and then I count them in all respects upon a par with those of the olden time. For although they are not marked with a brand, and though the greater part of the ancient rules and formalities have become obsolete, nevertheless, other regulations introduced by new Emperors have taken

[1] [For *de consil. domi.* read *de consil. princip.*—Tr.]

their place; and these the soldiers observe. This suffices, as Baldus has said.[a]

There is support, too, in the statement of Romanus[b] that soldiers of our day, who are in regular active service, are entitled to the old-time privileges. Hence he concludes that, in the case he is considering, a soldier's gift to his mistress is not valid, a point which Baldus[c] treats at considerable length.

And though Baldus does not agree with Romanus in this matter, note, however, that the soldier of whom he speaks was likewise a ruler, who stands above soldiers and above the laws. And Baldus himself admits that in that case of his he did not dare to render a different verdict; for by so doing, he would incur the ill will of the women to whom Bernabò, then Lord of Milan, had made many presents, as well as to their daughters (perhaps the issue of those adulterous connexions), to say nothing of wasting his time and making himself unpopular to boot.

37[1] And, to be sure, it is reasonable to condone in a sovereign a larger outlay upon his amours than in the case of a common soldier. And since the power of this passion is unbounded, so that it carries away even the best of men (i.e. sovereigns), it should be allowed those who have suffered injury at their hands to receive inalienable gifts, to offset the disgrace brought upon them—this latter finding no small extenuation because of the immensity of the power of a sovereign, who by his mere nod can inspire fear; compare the following:

All Olympus by his nod he caused to shake.[d]

For a woman is hard to find who would venture to resist a sovereign; as we read of the well known Bath-sheba, a woman in other respects exemplary, but who, when summoned to the couch of the king, at once obeyed.[e]

To come back now to our subject, it is through no fault of the soldiers that to-day they do not observe the old-time regulations. For sovereigns disregard these, and have introduced others; and if the latter are observed, it suffices. For the ancients made changes in not a few regulations that had been observed in still earlier ages.[2]

38 (2) Men are called soldiers [84′] by indulgence of the sovereign, and as a matter of compliment; and here again I make a distinction:

(*a*) They are fit and suitable for service, as is the case to-day with the greater part of those who are granted this favour by the Emperor or by kings. And these I think are entitled to the privileges which make for distinction—of which character are many of those above listed, e.g. that they be not searched for the carrying of arms, that they be not clapped into prison, that they be not put to torture, that, if condemned, they be not subjected to degrading punishments, and all other similar exemptions.

[a] *On Code* VII. lxxi. 1, last words.

[b] *Consilium* 43, qu. 4; again in 606, col. 1.

[c] *Consilia*, I. 267 (*Ad evidentiam*); repeated in V. 457, and again in 456 (*Recolo me consuluisse*).

[d] [Cf. Virgil, *Aeneid*, IX. 106.]

[e] 2 *Samuel* xi. 2 ff.

[1] [For 38 read 37.—Ed.]

[2] [For *secutis* read *saeculis*.—Tr.]

Perhaps, too, when making their wills, they are entitled also to those privileges which I have said above belong to soldiers away from the fighting line. This would follow with special cogency, if in honorary appointment it were specified that they are made equal to genuine soldiers and that they are like them—just as in a similar situation it is said of a man who[1] is made an honorary citizen that he is no less a citizen than the native born. Thus Bartolus;[a] and he is quoted and followed by Baldus.[b] All consider this point in connexion with *Digest*, II. iv. 8, § 1, though there is difficulty with *Code*, III. xxiv. 3, § 2, where Saliceto observes that a person who secures an office by privilege is not as worthy of so much honour as a person who earns it by his sweat (which must be obvious even to the ignorant and the unlearned). But though such are not equally worthy, still they are not wholly unworthy.

[a] *On Dig.* XLI. iii. 15, col. 14, at end.
[b] *On Dig.* III. v. 3, § 1.

And that the soldiers of our day are entitled to the ancient privileges is the decision of Paolo di Castro,[c] who on that ground sustains the will of a soldier made at his home (whither he had been conveyed to be treated for wounds received in war) just as if it had been executed in camp. Such, too, was the verdict of Socini,[d] who declares this to be the common view—speaking of a *filiusfamilias* who makes a will as to his personal belongings, and that, too, at home, and in general terms, and at any time. This, he says, is valid beyond any doubt.

[c] *Consilia*, II. 414 (*Viso et examinato*), col. 2.
[d] *Consilia*, III. 33, no. 4.

(*b*) Those who are made honorary soldiers stoop to sordid acts and 39
bring disgrace upon the dignity conferred; and then I think them undeserving any privilege. For a person who misuses privilege loses it[e] (this point is elaborated by Tiraqueau at great length, as is his wont[f]); and those who are eager for base gains should be honoured with no distinctions.[g]

[e] *Decretum*, I. lxxiv. 7; *Code*, I. ix. 11, at end; gloss on *Dig.* XV. i. 48.
[f] *De Nobilitate et Iure Primogeniturae*, chap. 27.
[g] *Code*, XII. i. 6.

However, treating this same topic, Saliceto[h] (following Jacobus de Belvisio, whose view he accepts) makes a briefer distinction, saying that 40
the nature of the privilege must be considered. For privilege holds, if well bestowed, otherwise not. Hence men in actual service enjoy all the privileges of the olden time; whereas others who are armed for show and display, and not for perspiration and the shedding of blood, are entitled only to those that are granted as an honour.

[h] *On Code* I. xviii. 1.

This distinction is not to be despised; and it fits well enough with what has been said above. And as for admitting soldiers in actual service to all privileges, [85] Saliceto has the support of Decio,[i] who holds that even after puberty a soldier may make a direct substitution. However, in regard to the other distinctions made above they are not thus agreed.[2]

[i] *Consilium* 578.

But[3] one point must be noted, namely, that though the Doctors 41
everywhere call 'soldiers' those to whom they apply the designation '*gilded*'—(a name used by Decio,[j] and before him by Jason, on *Code* I.

[j] *Ibid.*

[1] [For *quod* read *qui*.—Tr.]
[2] [For *concordetur* read *concordentur*.—Tr.]
[3] [For *Ad* read *At*.—Tr.]

xviii. 1, where also Saliceto comments rather obscurely)—and whom in the Italian tongue we call 'knights', still, despite the dissent of all, these are not properly named 'soldiers'—as was acutely remarked by Tiraqueau,[a] a man of wide reading and learning.

Furthermore, I do not believe that the privilege of this name should
42 be accorded to those soldiers or knights whom they call 'gilded', and who secure appointment with money—a thing which I saw to be a common and ordinary practice in the chancellery of Charles V, where even sellers of salt, with the help of twenty-five pieces of gold or thereabout, secured this honour, along with the right to legitimize any bastards, and to appoint clerks, and a hundred other prerogatives. Yet these persons for that reason are none the more to be reckoned among the nobles nor received among them; and as a matter of fact they are not recognized by the really noble, as was said also by Petrus Antibolus,[b] a French Doctor.

And with this I make an end of enumerating the privileges of soldiers, adding the single remark that, after the completion of this work of mine, such as it is, there came to my hand a treatise *On the Privileges of Soldiers*[c] by the celebrated jurisconsult Marcus Mantuanus.[1] But that I did not derive[2] these ideas of mine from that source, and that I did not appropriate his results, I think will easily be clear to those who will read both treatises.

[a] *De Nobilitate et Iure Primogenituraе*, viii. 13.

[b] *De Muneribus*, § 4, no. 62.

[c] [*De Privilegiis Militaribus.*]

## CHAPTER IV

### ON THE REWARDS AND PAY OF SOLDIERS

### SYNOPSIS

1 Our age is truly 'golden'.
2 Commanders who win a triumph.
3 Equestrian statues.
4 A golden crown for Publius Decius.[3]
5 One hundred cattle given as a reward.
6 Crown of grass.
7 Double grain ration a military reward.
8 Ten cattle and a crown of gold for Corvinus and Torquatus.
9 Golden armlets.
10 The reward for first scaling the enemy's walls: to whom given, if many scale the walls. [85']
11 In ancient times, things captured from the enemy did not become the property of the captors.
12 Gifts conferred by the army upon the general.
13 Temporary release from service was once a military reward.
Many other crowns and military rewards.
14 The civic crown an honour greater than others.
15 Exemption from civic burdens a military reward.
16 Soldiers rewarded by permission to use spices.

To generals and sovereigns it did not seem enough that soldiers be honoured with privileges, but they lured them on with rewards also.

[1] [For *Mantuae* read *Marci Mantuae.*—Tr.]
[2] [*auserim*, i.e. *hauserim.*—Tr.]
[3] [For *Decisio* read *Decio.*—Ed.]

What these were, and what their character, it is easy neither to tell nor to find out. For the whole matter depends upon the occasion, the fact, the place, the person, the success and issue itself, and in fine, upon the discretion and liberality of the donor. Moreover, the difference and the variation between periods is neither slight nor inconsiderable.

For in the rude and early stage of Roman history, and among the men who carried Italian power to such a height that it is destined to be[1] a wonder almost to the end of time, rewards were conferred more sparingly, because there was less wealth. And they were received with more honour and fitness, because they were striven for with far less parade[2] and avarice.

But in this 'golden' age of ours, for it may be said with the poet 1
of old:[a]

[a] [Cf. Ovid, *Art of Love*, II. 277 ff.]

> These truly now the golden ages are;
> With gold is highest honour bought—

for who would deny that this is a golden age, when everything is measured by a gold standard, and no rewards are prized excepting such as have a large money value and are sold at a high figure? And the soldiers are not so much to be blamed as the rulers and generals themselves.

For how few, rewarded for boldness or risk or noteworthy deeds, receive[3] less than the soldiers who face wounds and death in the line? Or who receive more generous reward than those of less desert? Men who look for rewards, and indulge in large expectations, need only to make themselves known to nobles or rulers or courtiers, even though it be through crimes and acts of disgrace. And to these courtiers and nobles themselves wealth is given without stint, in huge amounts, and with prodigal hand; whereas men of lower rank get nothing, or very little. So that in no other[4] age than ours has there been more fit application for that word of the Gospel:[b] 'Whosoever hath, to him shall be given.'

[b] [*St. Matthew*, xiii. 12.]

And it is not strange that, with such debased standards, and with all military discipline gone to wrack and ruin, with no rewards in store for the good, or punishments for the guilty, disasters and dire reverses fall to our lot from day to day, while examples of courage and soldierly [86] fortitude are exceedingly rare and trifling. It is my pleasure, therefore, to cite a few incidents of old, which may at any rate give entertainment in the reading, even though they profit not as incentives.

And, to begin with the leader and commander of the soldiers him- 2
self, this officer did not think beneath his dignity the reward of celebrating a triumph after winning a victory and putting to flight and destroying[5] or crushing the enemy; or, in case the exploit was not so

[1] [For *futura* read *futurae*.—Tr.] [2] [For *ambitiosus* read *ambitiosius*.—Tr.]
[3] [For *accipitur* read *accipit*.—Tr.] [4] [For *alio* read *alii*.—Tr.] [5] [*cesis*, i.e. *caesis*.—Tr.]

noteworthy, the reward, at any rate, of entering the city with an ovation. In those days this distinction was his sufficient recompense.

Thus, after subduing the Volscians, Camillus entered Rome in a chariot drawn by white horses, which was felt to be a distinction too great for a mortal.[a] But long afterwards Marcus Antonius, the triumvir,[1] celebrating the defeat of Brutus and Cassius, was seen entering the same city riding in a car drawn by lions—a sad omen for Roman liberty, namely lions tamed[2] to the yoke and obedient to the bridle.

3 In addition to the honour[3] of a triumph, many generals were granted also an equestrian statue set up in the forum—a distinction conferred upon almost countless Romans, both plebeian and patrician.

Men of the rank and file received other rewards. Thus that famous Manlius, who gained his cognomen from saving the Capitolium, was publicly commended by the officials for this action; and by agreement among the soldiers he received from each of them a half-pound of spelt and a gill of wine—a thing, as Livy puts it,[b] small in the telling; but their poverty made it a convincing proof of goodwill.

4 Much more valuable and complimentary was the gift conferred upon Publius Decius, who by his wit and at his peril, in company with a few picked men had rescued a consul and an army from a difficult position and serious danger, with the same valour and stoutness of heart saving his own life and that of his chosen companions. For this 5 he received a crown of gold and a hundred cattle, one of them being a 6 bull, splendid with gilded horns; also two crowns of grasses for saving the army and his detachment.[c] And his picked soldiers were rewarded 7 with a permanent double ration of grain.

8 So Valerius—who was also called Corvinus after slaying the Gaul —was presented with ten cattle and a crown of gold. Before his day, this had happened to Torquatus because of the killing of another Gallic challenger, from whom he took a necklace and that cognomen.

9 And four centurions, together with a maniple of spearmen, were rewarded by Papirius Cursor with armlets and crowns of gold because they had been first to scale the walls of Aquilonia.[d]

10 This bears on the question of the legists regarding a reward offered to the one who first scales the enemy's walls, namely: If many mount up together and simultaneously, what is to be done with reference to the reward?[e] For you see above that all who mounted up together received an equal reward. This procedure was followed also by Publius Scipio at the capture of New Carthage in Spain. [86′] Camillus, too, gave over to the army as a whole the plunder taken from the Volscians; so also after cutting the Etruscans to pieces. Fabius did the same, but with reservation of the gold and silver.

[a] [Livy, V. xxiii. 5.]

[b] [V. xlvii. 8.]

[c] [Livy, VII. xxxvii. 2 ff.]

[d] [Livy, X. xliv.]

[e] *On Dig.* Const. I; I. v. 15; XXVIII. vi. 34.

[1] [For *Triunir* read *Triumvir*.—Ed.]
[2] [For *ad actis* read *adactis*.—Ed.]
[3] [For *honorū* read *honorem*.—Tr.]

For—not to pass over this point in silence—the soldiers of the olden time were not privileged to keep for themselves what was captured in the fighting-line or in the plundering of a city; but they delivered such things over to the general. The latter at times turned the plunder into the public treasury, and at times—but rarely—he distributed it among the soldiers. So we read in not a few passages in Livy, one of which I should like to quote. When the camp of the Faliscans was taken, he says, the plunder was consigned to the quaestors, to the great indignation of the soldiers. However, held in check by the severity of the discipline, they admired the probity that made them angry.[a] 11

[a] [Livy, V. xxvi. 8.]

After the rout of the Samnites, Quintus[1] Fabius, too, gave a largess to his soldiers; for each received eighty-two *denarii* of copper (this amounting, as I have above shown, to as many *reals*—unless the *denarii* of copper differed from others) along with coats and shirts, as rewards, which, as Livy observes,[b] in that age were not gifts to be spurned.

[b] X. xxx. 10.]

But, on the other hand, the consul Gaius[2] Valerius, after storming the enemy's citadel at Carventum, sold the plunder at auction and turned the proceeds into the treasury,[c] announcing that the soldiery would have a share in the booty, at such times as they had not objected to enlistment; for on this occasion the populace had unwillingly enrolled for service.

[c] [Livy, IV. liii. 10.]

Furthermore, gifts were sometimes made to the commander-in-chief by the army as a whole. Thus, when the famous[3] Quinctius Cincinnatus, summoned from his farm labour to the dictatorship, by his soldierly courage and a defeat of the enemy had rescued a consul and army beset by the Aequians,[4] he distributed all the plunder to his own army, the other army under the consul losing it, and the consul himself being relieved of his command. Yet the consular army, thinking rather of the help received than of the loss suffered, voted to Cincinnatus a golden crown weighing a pound, and when he departed they acclaimed him their patron.[d] In like manner Fabius Maximus was hailed as 'patron' by the army which, through the rashness of Minucius, master of horse,[5] had been put in peril of slaughter and destruction at the hands of Hannibal.[e] 12

[d] [Livy, III. xxix. 3.]

[e] [Livy, XXII. xxx. 2.]

And in the case of the soldiers from Praeneste, who, though suffering the extreme of hunger, had long held Casilinum against Hannibal, the senate voted as a reward double pay and release from service for five years.[f] 13

[f] [Livy, XXIII. xx. 2.]

But why do I enumerate individual awards, when my entire book would not suffice to describe them all? Who could readily write of so many crowns designed for reward—civic, wall,[6] naval,[7] intrenchment?

[1] [For . *Quod* read *Q*(*uintus*).—Tr.]
[2] [For *P.* read *C.*—Tr.]
[3] [For *illae* read *ille.*—Tr.]
[4] [For *Equis* read *Aequis.*—Tr.]
[5] [*Militum* is an obvious slip for *Equitum.*—Tr.]
[6] [*Valares*, i.e. *vallares.*—Tr.]
[7] [For *Rostiatas* read *rostratas.*—Tr.]

Who could tell of the pointless spears, badges,[1] necklaces, armlets, and other awards for courage and fortitude?

14 But the civic crown was esteemed above all others, though it was only of oak leaves. For in honour of the possessor even senators would
15 rise at the public games, and to him was granted excuse from civic burdens. So important was it to have saved the life of a citizen in battle.

16 Finally, the Dictator Caesar rewarded [87] some of his soldiers with the privilege, among other things, of using condiments.[2] But what soldier of the present day would not, with reason, laugh to scorn such a reward?—since they enjoy the use of condiments and all luxuries no less in the field and during war than at home and at leisure, and since, to quote the comic poet,[a] the camp is followed[3] to-day by confectioners, fishmongers, butchers, cooks, sausage-makers, fishermen, and fowlers; and if wine should be lacking for a single day, there will be all but a mutiny. And should the commander attempt to reduce the men to soldiers' biscuit and lard and sour wine, it would be a simpler matter to expel the Turk from Europe.

[a] [Terence, *Eunuch*, 256 ff.]

Furthermore, in Tacitus[b] one may read of 'nail money', which was a kind of largess.

[b] [*Histories*, III. l. 5.]

## CHAPTER V

### AGAIN ON THE PAY OF SOLDIERS

### SYNOPSIS

1 For more than three hundred years Roman soldiers served at their own expense.
2 When pay first began[4] to be given to the Roman infantry.
3 When the Romans first began[5] to mint silver.
4 When pay began[6] to be given[7] to the Roman cavalry.
5 How much the pay of a Roman infantryman was.
6 How much the pay of a Roman cavalryman was.
7 The wages of the Roman soldiers were paid partly in money and partly in supplies, i.e. clothing, foodstuffs, and other things of that sort.

BUT the things above mentioned were the unusual rewards of the
1 soldier; the usual reward was the pay itself. And that the Romans previously had served at their own expense is shown clearly, for example, by the following passage from Livy: When Gaius Valerius Potitus,

[1] [*faleras*; i.e. *phaleras*.—TR.]
[2] [Caesar, *Civil War*, III. liii. 5 (the text there, however, is impossible, and it has been variously emended).—TR.]
[3] [For *comiltentur* read *comitentur*.—TR.]
[4] [*ceptum*, i.e. *coeptum*.—TR.]
[5] [*ceperunt*, i.e. *coeperunt*.—TR.]
[6] [*ceptum*, i.e. *coeptum*.—TR.]
[7] [See the text under this number.—TR.]

Quintus Fabius Vibulanus, Gaius Servilius Ahala[1], and Lucius Furius Medullinus, tribunes of the soldiers with consular power, with three armies were wasting the Volscians and had plundered Anxur, a rich city 2
of that people, the senate then for the first time ordered that the soldiers should receive pay from the public treasury, whereas before this time each man had served at his own expense. So Livy.[a] This was in the three hundred and forty-seventh year from the founding of the city, and the one hundred and third from the expulsion of the kings, if we may trust Haloander.[b]

[a] IV. lix. [11].

[b] *Annorum... ad Quartum D. Iustiniani Consulatum Digestio.*

Livy adds[c] that at this time [87′] Rome was not minting silver, 3
but coined copper only.

Not much later (in fact, eleven years afterward), when Veii was 4
under siege, the knights began to serve with their own horses, so Livy relates.[d]

[c] IV. lx. 6.

[d] V [vii. 5].

What the pay of the individual soldiers was is nowhere more clearly 5
indicated (so far as I can recall) than[2] in the passage from Tacitus already cited—namely, a *denarius* per day. This coin weighed a little more than a drachm of silver, which is the weight of the Spanish *real* and the gold crown. By the month, this would amount approximately to three gold crowns, which to-day also is the minimum pay of infantrymen.

What the pay of the cavalryman was, if I must confess the truth, 6
I do not know that I have ever anywhere read. Leonardus de Portis, in that treatise of his of which I made mention above,[e] states that it was three times as much as that of the foot-soldier. But to me it seems very surprising that in the course of so many years the pay of the infantry should increase not at all, and that the pay of the cavalry should fall off so much; for to-day they receive only five gold crowns.

[e] *De Sestertio, Pecuniis, Ponderibus et Mensuris Antiquis*, II.

Moreover, if my text is not corrupt, a passage in Livy indicates that the ancient cavalrymen also were apportioned five crowns per month. For, says Livy, when the Campanians were subdued after their revolt, citizenship was granted to the Campanian horsemen who had remained faithful; and as a memorial, there was set up[3] a bronze tablet at Rome in the temple of Castor; and the Campanian people were ordered to pay a tax to these men individually every year. Their number was a thousand six hundred, and they received forty-five[4] *denarii* each.[f]

[f] Livy, VIII xi. 16].

Accordingly, these forty-five *denarii* apiece, if we understand them for the month (paid yearly, as wages usually are), we now see to be about the same as five gold crowns apiece—or a little in excess of that, if you assume the *denarius* to be of heavier weight, as I explained above, when discussing the *denarius*, pointing out that it was made lighter after the time of the Emperor Claudius. (And we may not assume

[1] [For *Hala* read *Ahala*.—Ed.] [2] [For *clariusque* read *clarius quam*.—Tr.]
[3] [For *fecerunt* the text of Livy has *fixerunt*.—Tr.]
[4] [The text of Belli's copy of Livy evidently was corrupt, as he suggests.—Tr.]

that so small a sum was for the year—nor yet that it was for a day; for that would much exceed what it is right and reasonable to suppose.)

7 Leonardus de Portis again says[a] that two-thirds of the infantryman's yearly wage of thirty-six gold crowns were paid in money, and one-third in clothing and other necessary supplies. This view is supported by numerous passages in Livy, where he records that the allies of the Romans supplied the soldiers and the army with money, grain, and clothing, and that conquered enemies were condemned to such payments.

[a] In same treatise.

## CHAPTER VI

### ON THE SUPPLY OF GRAIN AND OTHER THINGS NEEDFUL FOR THE ARMY

### SYNOPSIS

[88]

1 A ruler should look carefully to the grain supply.
2 New grain is not to be rationed until the old is used up.
3 Those who nominate an officer are liable for the misdeeds of the nominee.
4 An account should be rendered[1] often, because thefts are thus more easily detected.
5 When clothing is to be distributed to the soldiers, both for summer and winter wear.
6 What the soldier's *solacium* is.
7 He who has failed to claim his grain in time of abundance may not ask for it in a time of scarcity.
8 Soldiers should not extort anything from the provincials.
9 Provincials are not under obligation to supply the soldiery with olive oil, wood, and mattresses.
10 How a house is to be portioned out when a soldier is billeted upon it.
11 The discretion of the soldiery is like the wolf's discretion, and even worse.
12 When a sovereign makes war, he should not burden foreign peoples.
13 Soldiers should be content with their wages.
14 The Turks live at very small expense in the field.
15 That soldier will make poor use of his arms, who disdains[2] to carry them.
16 Rank in the service.
17 Only the Emperor may appoint soldiers to take the place of those deceased.
18 He should have the preference who has served longest.
19 Free bread.
20 Free grain.
21 What the *sextarius* is.
22 Bread and meat and other things given to prominent men by order of a sovereign.
23 *Soldata*, and *feudum de caneva*.

1 Beyond all else, the grain supply concerned the state (and the Emperor, too, after this office was created[3]), lest the army should suffer from hunger or scarcity. For, as Vegetius[b] says, an army is more often destroyed by want than by fighting; and starvation is worse than the sword.[4]

[b] [*Rei Militaris Instituta*, III. iii, at the beginning].

[1] [For *redenda* read *reddenda*.—Tr.]
[2] [See the text under this number.—Tr.]
[3] [*ceptus*, i.e. *coeptus*.—Tr.]
[4] [For *ferrè* read *ferro*.—Tr.]

Hence the laws of the Emperors regarding the deposits of grain in the state granaries,[a] among which is an order that the fresh grain supply be left untouched until the old has been disposed of; or, if the latter has spoiled, that enough of the new [88′] be mixed in to disguise the defect.[b] 2

Hence, too, the supervision of the granaries, to the intent that they be kept in good repair,[1] and that the grain suffer no injury from leaks. It was forbidden also that any one should lay hand to the grain with the purpose of removing it, under penalty of exile and with confiscation of the goods of the lawbreaker.[c]

Furthermore, in the collection of foodstuffs, it was ordered that for no reason whatsoever was any one to be excused.[d] Likewise, that no one be exempted in the matter of cooking and transporting soldiers' biscuit.[e]

In charge of the state granaries were overseers and receivers, whose business it was to store at once in these granaries what was supplied.[f] And the receiver had no right to allow the grain of private individuals to be stored therein.[g]

These officers were chosen by the court; and those who nominated them were liable for their misdeeds,[h] of course, after action had been brought against the officers in their own person. Further, the receivers were obliged to render an account of their transactions each year; and the reason assigned is that a recent theft is more easily detected and rectified than one of long standing.[i] To-day all this business falls to the food administrator, who, as I have already said in another place, is called the commissary general; but how diligently he attends to it we often have had occasion to notice. 3 4

As I have stated, clothing also was provided for the soldiers by the state; and, in the matter of supplying this,[2] the provincials had fixed periods of delivery (i.e. of contributions of clothing for this purpose), namely, from the month of September to the month of April. But the soldiers themselves received garments at once in September for the winter, and in April for the summer; compare *Code*, XII. xxxix. 1, a law cited by Durandus[j] in support of this, though it is not so stated there in the text, but in a gloss. 5

As has also already been noted, money, too, was given with the above, which the soldiers sometimes received under the name of *solacium*; so *Code*, XII. xxxvii. 16, § 1. This was either what to-day they call 'present' and 'relief', or something similar, as we gather from the above law. But usually money was given under the name of pay.[k] 6

When not in active service, however, I think that the soldiers were supported for the most part by payment in grain, as is indicated by *Code*, XII. xxxvii. 3, 4, and 6. And, in the law last mentioned, it is 7

[a] *Code*, X. xxvi.
[b] *Ibid.* 1.
[c] *Code*, X. xxvi. 2 and 3.
[d] *Code*, X. xxvii, sole law.
[e] *Code*, XII. xxxviii. 2.
[f] *Code*, X. lxxii. 7.
[g] *Code*, X. lxxii. 6.
[h] *Code*, X. lxxii. 2 and 8.
[i] *Ibid.* 4.
[j] *Speculum*, tit. *De Procuratoribus*, § 1, words *Item quod est miles.*
[k] *Code*, XII. xxxv. 1 and 5.

[1] [For *fectaque* read *tectaque*.—Tr.]
[2] [For *eorum* read *earum*.—Tr.]

ruled that a soldier who fails at the proper and appointed time to claim the allotment of grain owing to him (perhaps because it is rather low in price, and he can readily support himself from another source, and he is shrewdly planning to put off his claim to a time of scarcity), such a man forfeits his right altogether, and is disqualified for subsequently claiming his share. This is stated also in *Code*, XII. xxxvii. 7, where a gloss notes the case of [89] Albertus Calvus, who supplied grain to the rustics, and refused to accept it in payment when it was cheap. This law is applied also by Baldus[a] to collectors, who are paid in grain; he adds, however, that the above penalty of loss of claim will not hold outside the case in the law referred to, but that a man will merely have his claim settled on the basis of the price-scale during the former abundance, when settlement was due.

[a] *On Code* IV. xxxii. 19, qu. 16.

8 Soldiers should be content with these things received from the
9 state, and ought not to extort anything from the provincials.[b] Hence they will not demand fire-wood, or oil, or even a mattress[c]—in a word, anything needed for the maintenance of man or beast.[d] Happy the times, and worthy the sovereigns to secure[1] world control, when it was not allowed to demand so much as a bath from the host—when, in fact, those who even supplied such things voluntarily were liable to punishment—I suppose because of corruption of the discipline.[e]

[b] *Code*, XII. xxxvii. 3.
[c] *Code*, XII. xli, sole law.
[d] *Code*, XII. xl. 5.
[e] *Code*, XII. xl. 5 and 6.

10 What of the fact that (with a view to avoiding any clash and quarrel between the soldiers and the owners) residences were all but marked off in sections by the laws?—which directed that the owner should divide his house into three parts, and that he himself should take the first choice, the soldier the second, and the owner again the third; so that the soldier would not find his third the worst, nor yet the best. On the other hand, if a person of note was to be entertained, the house[2] was divided on even terms.

How different the present practice! Even a soldier of the rank and file will banish a host of the highest standing to a corner of the house scarce fit[3] for a servant, and the lady of the house he will drive from her chamber.

On *Code* XII. xxxvii. 3, Bartolus and others make the comment that soldiers of the court may not require that the host serve meals (this they perhaps understood as referring, not to the provisions, but to the serving). But to-day, would that even a fourth part of the year there were excuse from the business of preparing and providing! And would that the soldiers were content with modest entertainment, and with what they provide for themselves when they pay the bills, or with even a little more than that!

They call this 'living at discretion', when they eat free meals—the

[1] [For *imperarent* read *impetrarent*.—Tr.]
[2] [For *domns* read *domus*.—Ed.]
[3] [For *condecens* read *condecentem*.—Tr.]

discretion of the wolf and lion, or, better still, of the Devil! For animals 11
eat a sufficiency, but these soldiers gorge and guzzle, and lick the plate, and finally even extort money. Would that sovereigns, generals, and others in control, at least had reverence for God, if they regard not man; for in that case they would not tolerate this sort of thing. Would that the majority of officers and leaders did not follow the same practice[1] themselves! Would that they did not set the fashion for the others!

Would that kings would at least burden only their own provincials! 12
With regard to[2] foreigners, who owe allegiance to other sovereigns and are bound to them by no law, they had better consider with what right and justice and with what conscience they impose these burdens. Their advisers, too, had better have a care; so also the confessors and preachers, who always travel with them, [89′] and who, though they ought to be 'fishers of men', are fishing for the bishopric and other honours. I would that these words of mine might fall into their hands; at any rate they would blush for shame, if they do not reform.

John the Baptist directed the Roman soldiers to be content with
[a] [*St. Luke*, iii. 14.] their wages,[a] as I have noted in another place. And this is worth repeat- 13
ing: that they should do violence to no man and oppress no man. Thus those soldiers, who knew not God, were yet anxious regarding their salvation; whereas these warnings are ignored by those who claim to be Christians. With good reason, therefore, such warriors are taken
[b] *On Code* XII. xxxvii. 6. to task by Lucas de Penna.[b] If, says he, they chance to go upon an expedition, they burden the pack-animals with wine, and not with iron; with cheeses, and not with spears; with sacks, and not with swords; so that one would fancy that they were setting out to a banquet,
[c] *Ibid.* and not to war. This he elaborates at length.[c]

As if the Turks did not live in the field on almost nothing! As if 14
a longer baggage train does not follow one of our armies of ten thousand men than follows them when they make expeditions with thirty thousand! I have very often observed, when our armies were on the march, not a few men—and not the rank and file, either—throwing off their breastplates and helmets upon a pack animal, and passing their lances (which they call pikes) to a servant (who becomes truly an 'armour-bearer'), while they themselves enjoyed the company of a mistress, or at any rate marched more comfortably, so as to become less 15
fatigued. Yet Quintilian declares that no man can make good use of arms who has not learned to carry them.

How much better the training of the soldiers of ancient times! In the initial period of their service, a weight of sixty pounds was added[3] to their arms; and, thus equipped, they were obliged to march at the regulation pace, whereby they normally covered twenty miles

[1] [For *non eadem* read *eadem*.—Tr.]
[2] [Reading *Ad* for *At*. Probably the sentence structure is imperfect.—Tr.]
[3] [See, however, the text of Vegetius, I. xix.—Tr.]

a day. So we read in Vegetius,[a] who adds also that on hard campaigns the individual soldier was required to carry on his shoulders his own arms and supply of food.

This is also indicated by a passage in Cicero's *Tusculan Disputations*:[b] 'First', says he, 'you see whence our armies derive their name; and then you note what the labour is—how severe the toil of the march, to carry food for more than a half-month, to carry whatever is needed for use, to carry the intrenchment stake. For our soldiers no more count shield, sword, and helmet a burden than[1] they do their shoulders, arms, and hands. For they call military arms the soldiers' limbs; and', says he, 'they carry them so conveniently that, if emergency arises, throwing aside their other loads, they can fight with arms all ready to hand, just as if they were limbs'. Thus Cicero.

Soldiers of to-day make excuse, and dispute the charge of extortion on the ground that the periods of living at discretion are reckoned against their pay. But how far this justifies them from the point of view of the provincials,[2] it is for them to determine. And sovereigns need to explain on what grounds they justify and utilize this procedure; but perhaps it is not so much their fault as that of their agents, who have more[3] regard for a king's profit than for his honour and salvation.

16 Finally, there are [**90**] grades of advancement in the service. For on the basis of courage and valour men are promoted from their posts
17 to higher divisions; but only the Emperor may advance them. So *Code*, XII. xxxv. 14, at the end, and *Code*, I. xxxi. 5; and more clearly in laws 1 and 2 of the same title: 'No one shall be advanced on any
18 other basis[4] than that of actual service'; and 'those whom the order of the service and more numerous campaigns and more abundant labours have caused to advance'. To-day these laws might be stricken from the books.

However, the chief of records on his own motion may reduce the rank of a soldier who deserves it.[c] But to-day the commander of the army promotes and removes at his discretion, except in the case of a few higher positions, and he even makes appointments to replace men deceased, which under the ancient law could be done only by the Emperor.[d]

19 And not to go farther afield regarding this matter of rewards, among the soldiers' perquisites might be reckoned 'free bread', of which mention is made in *Code*, V. xii. 31, § 5, and in the *Authenticum* (and
20 *Novels*), lxxxviii. Under another name this was spoken of as 'free grain';[e] and it was referred to also by the general term 'service claim'.[f]

Alciati[g] thinks these grants were thus designated[5] because they were originally gifts of food to the populace at the hands of the

[a] *Rei Militaris Instituta*, I. ix and xx [xix.]

[b] [II. 37.]

[c] *Code*, I. xxxi. 3.

[d] *Code*, XII. xxxv. 17 and 18.

[e] See the enactment of *Authent.*, VII. viii.

[f] *Code*, III. xxviii. 30, § 2; *Code*, VI. xx. 20, at the beginning; *Code*, VIII. xiii. 27; *Dig.* XIX. i. 52, § 2; *Dig.* XXXII. xi, § 16; *Authent.* LIII. v; *Authent.* (and *Novels*) CXXXVI. ii, and often elsewhere.

[g] *Parerga*, VIII. v.

[1] [For *numerantque* read *numerant quam*.—Tr.]
[2] [For *Provincialibns* read *Provincialibus*.—Ed.]
[3] [For *magisque* read *magis quam*.—Tr.]
[4] [The reading of *Code*, I. xxxi. 1 is doubtful.—Tr.]
[5] [i.e. as (*panes, annonae*) *civiles*.—Tr.]

Emperors, being later changed to a largess of definite amount; and on this ground he criticizes Aelius[1] Donatus, who, in his *Life of Virgil*, says that the latter argued that Augustus was the son of a baker, because he very often sent him loaves in return for his poems[2]—assuming that, if bread was given, it was 'free bread'. But I think that what Donatus said may be literally true, namely, that real wheaten loaves were given.

This practice is indicated by Flavius Vopiscus in his *Life of Aurelian*.[a] For he says that while the latter was at Rome, sixteen fine military loaves were given him daily by order of the Emperor Valerian, together with forty other ration loaves (which I think were bread of inferior grade), and forty pints of wine for his table.

[a] [Chap. ix.]

And I would not have you suppose that those pints were like the 21
*sextarius* in general use to-day.[3] For, as Alciati points out,[b] that pint amounted to sixteen ounces, which fits with the word of Horace[c] in regard to a simple and frugal way of living:[4]

[b] *Parerga*, I, xxv.

[c] [*Satires*, I. i. 74.]

Bread may be bought, greens, a pint of wine.

Those forty pints, then, will amount to approximately twenty-four quarts.

In addition, the Emperor ordered to be given to him half a young 22
pig, two chickens, [90′] thirty pounds of pork, eighty of beef, a pint of oil, another of second grade oil, and a like amount of sauce and salt. Like gifts he writes[d] were apportioned to Claudius by order of this same Valerian on his elevation to the throne.

[d] [*Claudius*, xiv.][5]

So you see that real bread was given. And yet I do not reject the statement of Alciati that 'free bread' was commuted to a money payment; for this understanding is favoured[6] by the name itself,[7] i.e. by the fact that it is designated *civilis*. (You will note, further, how easy it was to satisfy prominent men who climbed even to the throne of empire.)[8]

In fact, I think that[9] 'free bread' differs little from the pensions which kings to-day grant to soldiers and others who have served them well. Such was the pension granted me by Philip, King of Spain, the most munificent of living sovereigns; for he apportioned me four hundred crowns yearly for[10] life. These largesses are what the feudal laws call *feudum soldatae* or *feudum de caneva*. 23

But since in many enactments there is mention of 'free bread', 'free grain', and 'the grain ticket', as in the laws cited just above and

[1] [For *Eluiũ* read *Aelium*.—Ed.]

[2] [This doubtful pleasantry is not found in the *Life of Virgil*, once ascribed to Donatus, but now attributed to Suetonius. But in another place (*Augustus*, iv), the latter writer credits Antonius with originating gossip to the effect that the great-grandfather of Augustus was a baker.—Tr.]

[3] [The reference is to a measure of several gallons' capacity.—Tr.]

[4] [For *victus* read *victu*.—Tr.]

[5] This life is ascribed to Trebellius Pollio.—Tr.]

[6] [For *congrue* read *congruit*.—Tr.]

[7] [For *ipsas* read *ipsa*.—Tr.]

[8] [For *fastigicem* read *fastigium*.—Tr.]

[9] [For *illis* read *illi*.—Tr].

[10] [For *quo ad* read *quoad*.—Ed.]

in *Digest*, XXXI. xlix, § 1 and lxxxvii, near the beginning, I wish[1] to say a word about these.

I premise that they commonly were designated by the name 'service ration' (*militia*). They consisted[2] in certain annual payments to persons so entitled, made normally either by the state or by some private person. Of this sort, or not very different, are what are designated 'gate privileges' in the imposts of Saint George; or better, they are like what at Rome they call 'riparian rental', and numerous other sources of income; for the above-mentioned 'gate privileges' are in many points different from both.

I believe, moreover, that those grain tickets were restricted, one to a person. And it is clear that all 'service rations' were not of the same grade and kind. For some such claims were transferable, and could be passed on to an heir, others could not.[a] Some, though terminating at death, still bound the person who had profited thereby to pay a definite sum to the heir.[b]

[a] See the regulations in *Code*, VIII. xiii. 27; *Code*, III. xxviii. 30, § 2; *Authent.* LIII. v.

[b] *Code*, III. xxviii. 30, § 2.

Further, I think that those grain tickets[3] called for a monthly or yearly payment, regularly[4] apportioned to the tribes perhaps, if not to all, at any rate to the poorer. I believe, too, that they were negotiable. For any man enrolled in the tribes could sell his claim to another, provided that he was not of the same tribe.

Nearly all this seems to me to be established by *Digest*, XXXI. lxxxvii, near the beginning. For Titia ordered a grain ticket to be bought for Seius; and though [**91**] Seius by gift otherwise secured the grain ticket,[5] the heir of Titia is obliged to pay to him its value;[6] for if in the person of the same individual the ticket[7] could be duplicated, then it would have needed to be made good, not in value, but in kind.

But[8] the grain ticket[7] in question was a sort of imaginary possession. For that it was not a true and actual possession is shown by that text: ('since such a *fideicommissum* is more a matter of amount than of actual possession'). Furthermore, inasmuch as the grain ticket came into the freedman's hands by gift, if it were an actual possession neither it nor its value would have been a liability[9] of the heir. For duplication in the same gift is not allowed.[c] Again, we have the evidence of *Digest*, XXXI. xlix, § 1, which states that it is the value, and not the grain ticket itself, which is regarded as having been willed.

[c] *Inst.* II. xx, § 6; *Dig.* XLIV. vii. 17

From the above passage it is clear also that the privilege itself was terminated by death. For if that were not the case, doubtless the legatee would have passed it on to his heir; though the jurisconsult there

[1] [For *liber* read *libet*.—Tr.] [2] [For *constituebant* read *constabant* or *consistebant*.—Tr.]
[3] [For *illa frumentarias* read *illam frumentariam*.—Tr.] [4] [For *solibam* read *solitam*.—Tr.]
[5] [For *tessoram* read *tesseram*.—Tr.] [6] [For *aestimationi* read *aestimationem*.—Tr.]
[7] [For *tessere* read *tessera*.—Tr.]
[8] [For *se* read *sed*.—Tr.] [9] [For *praestandi* read *praestanda*.—Tr.]

states that the legacy is not cancelled by the death of the legatee, but in the sense that the value is regarded as transmitted.

And from this I think that it might be argued that if a testator directs his heir to buy a position for his friend Gaius resident at Rome (let us say, a secretarial position at the Papal Court); if Gaius dies after the legacy becomes effective, he transmits the same[1] (i.e. the value and worth of the office) to his heir; and the value itself will not be cancelled by death, though this would not be true of the appointment, supposing it to have actually been bought.

There is a similar case also in *Digest*, XXXII. i. 35, near the beginning. A patron orders that class privilege (*tribus*) be bought [by his heir] for a freedman of his. The heir delayed[2] long to buy, and the freedman died,[3] making a certain very prominent man his heir. It is stated in that law that the value of the class privilege is due to this heir. A gloss there inquires why the thing itself, i.e. the class privilege, will not be made over to him; and the reply is that this is not required, because a definite person was specified as the one to receive the privilege. I think that this is far from the meaning of that law. For if you assume, with the gloss, that *tribus* ('tribe') means 'increase of slaves', what[4] hinders the claim of the freedman's heir to the identical thing, rather than to its value?

My own view is that this *tribus* ('class privilege') was something like 'free bread' or the grain ticket. For those perhaps were distributed to the poorer tribesmen by the day, or the month, or the year, not being received by persons outside of the tribes, nor yet by people of greater wealth. Since, therefore, in view of his station, the very prominent heir of the freedman was incapacitated to receive that legacy, it might appear that under this head the freedman had passed on nothing to him. But in the above law the reverse is ruled, namely, that the value of the class privilege is due to him, because it is really a legacy. And so the situation is the same as in *Digest*, XXXI. xlix, § 1.

These references to the grain ticket (*tessera*) and [91′] class privilege[5] (*tribus*) are very differently understood by Accursius and Bartolus and all the postglossators. Any one who does not like my interpretation may provide a better, or accept the old.

But to proceed with this subject of grants (*militiae*), we must recognize that originally none were negotiable. For they were official, and did not admit of trafficking, resting solely upon the generosity of the Emperor. And for this reason they were neither sold nor mortgaged, and perhaps they were not conveyed to an heir.[a]

[a] For all this see *Authent.* LIII. v.

Later, they began[6] to be sold and passed on to an heir, and even

[1] [For *cum legato* read *eum legatum*.—Tr.]
[2] [For *more* read *mora*.—Tr.]
[3] [*poena*; reading doubtful. A good sense would be given by *repente* ('suddenly').—Tr.]
[4] [For *quod* read *quid*.—Tr.]
[5] For *Tribus* read *tribu*.—Tr.]
[6] [For *ceperunt* read *coeperunt*.—Tr.]

mortgaged,[a] but with a distinction: (1) the creditor had advanced the money for this[1] specific purpose, namely that the grant be purchased, and then he had the preference over all creditors, even the earlier,[2] as is shown in *Code*, VIII. xiii. 27, near the middle, and *Code*, VIII. xvii. 7; or (2) a merely general contract had been made, and then the creditor in his due order laid claim[3] to the debtor's grant (i.e. by action based on the contract), or he collected from the heir as much of it as could be realized, or, again, in case the grant lapsed at death, the amount ordinarily paid to the Emperor for the same.[b]

[a] *Code*, VIII. xiii. 27.

[b] *Code*, VIII. xiii. 27; *Code*, III. xxviii. 30, § 2.

As against a creditor who held a merely general pledge, a wife had the prior claim—or even her sons suing for the dower.[c] And it is even declared[d] that it makes no matter that the money was loaned for the purchase of a grant, unless this fact was expressly set down in writing; so that mere testimony on this point is of no value.

[c] In *Authentica* following *Code*, VIII. xiii. 27; namely[4] *Authent.* LIII. v, and XCVII. iv.

[d] *Ibid.*

Moreover, in the *Authenticum*, LIII. v, we find all this enacted at greater length. For the Emperor allowed that both in particular and in general these grants be made[5] subject to the claim not only of the man who[6] loaned money to procure them, but also of the wife and sons, and of other creditors.

And, in my judgement, we might argue from this passage that in the case of a purchased fief (bought, however, from the Emperor himself), payment could be made to the wife on the dower account, and also to the creditors, at least to such as had advanced money for the purchase. But note that this law or enactment is not quoted by any one in support of such an application.

Another thing, too, can be seen in that passage, namely the breadth of the generosity of the Emperor, who desired what he gave to be a stable and lasting possession. But in these days, if kings show any liberality to those who have served them well, and grant any pensions —which without doubt are the same as grants (*militiae*)—they add the proviso: 'So long as he comports himself well, and it is our pleasure';—implying that past service will count for nothing, unless the yoke is endured for all time. Others make a grant 'for life', even when rewarding a man of sixty, who has served all his days. And would that they paid what they promise!

The person selling a grant was under no other obligation to the buyer [92] than that he relinquish to him extraordinary action against the person making the annual payment.[e]

[e] See *Dig.* XIX. i. 52, § 2.

Again, if a person under obligation to buy a grant for another is charged something beyond its cost (e.g. according to the custom of the present day, some small amount as an honorarium for the secretaries),[f] this expense, too, he must bear.

[f] *Dig.* XXXII. cii, §§ 2 and 3.

[1] [For *haec* read *hoc*.—Tr.]
[2] [For *deterioribus* probably read *anterioribus*.—Tr.]
[3] [For *vendicabat* read *vindicabat*.—Tr.]
[4] [The text at this point is inexact.—Tr.]
[5] [For *possit* read *possint*.—Tr.]
[6] [For *quę* read *qui*.—Tr.]

[a] *On Dig.* XXXVII. vi. 1, § 15.

Bartolus[a] discusses at length whether a grant which a father buys for his son is to be counted as the latter's legal possession or shared also by his brothers. And it might be sufficient to give the reference to Bartolus; but, touching on his statement, note the distinction: (1) The grant is one that cannot be sold or transmitted to an heir (such, he says, are prebends and church benefices), and then, whatever the father may have expended therefor, nothing will be credited to the son (however, I have at times seen it otherwise ordered in regard to the wills of nobles—but improperly); (2) it is a grant that may be sold, but not transmitted (such, I think, are those riparian rentals which I have mentioned, and also the offices in the Roman court; such also I hear to be senatorial positions everywhere in France), and then the grant will be credited and shared.

[b] *Ibid.*, col. 2.

We must note, however, that the full cost price is not credited, but the market price at the time of the father's death; so Bartolus.[b] And this must be understood with the further reservation that, from the market price at the time of the father's death, the expense entailed by the position itself is deducted. For let us suppose that the father of a jurisconsult bought for him a senatorial position at the court of Paris, the market value of which at the time of the father's death was two thousand pieces. This whole sum will not be credited or shared, but deduction will be made for the maintenance, attendance, and expense entailed by the office. For it would not be fitting that it be sold absolutely, and the son reduced to private station. This I gather

[c] *Ibid.*, col. 3.

from the words of Bartolus, who says[c] that as much is to be shared as was realized from the sale of the position, deducting the maintenance of the same—words which, if otherwise understood, would have no application; for if a position is sold, the expenses of the maintenance would cease. The same thing is implied by the text of *Digest*, XXXVII. vi. 1, § 16; and such was the understanding of the gloss on *Code*, VI. xx. 20, § 1 and III. xxviii. 30, § 2. (And if a position can both be sold and transmitted, all the more will it be credited and shared.)

Again, if it were a civil, or, as they say, a secular position which it was not customary to sell (as is true almost everywhere of senatorial[1] positions and all magistracies generally, even though they be granted for life), supposing[2] it to have been secured from the Emperor through the agency of one of his staff, who[3] generally receive no small commission for such services, this expense will by no means be charged against the son. [92′][d]

[d] *Dig.* XXXVII. vi. 1, § 16.

But, in the case of the *silentiarii*, the above mentioned rule[4] for crediting and sharing does not hold, however negotiable the position may be.[e] This should have been added to what I have said at an earlier

[e] *Code*, XII. xvi. 5; *Code*, III. xxviii. 30, § 2.

[1] [For *senatorias* read *senatoriae*.—Tr.]
[2] [Reading *esto quod* for *est quod*.—Tr.]
[3] [For *quod* probably *qui* should be read.—Tr.]
[4] [i.e. of Bartolus.—Tr.]

point regarding the privileges of soldiers, under the first head, namely that what a father presents[1] to his son for military purposes becomes a part of the latter's military acquisitions. For although that holds, in the present case the position will in addition become the son's legal possession; for otherwise there would be no special favour for the *silentiarii*, as provided in the laws last cited.[2]

## CHAPTER VII

### THINGS FORBIDDEN A SOLDIER BY LAW

### SYNOPSIS

1 A heretic cannot be named as heir by a soldier.
2 A soldier may not leave a courtesan as his heir.
3 A slave cannot be named as heir by a soldier, unless he is emancipated.
4 A father in the service may not make a bastard son his heir.
5 Soldiers may not acquire land in the province where they are serving.
6 What is not allowed in person is allowed through the agency of another.
7 Whether officials may acquire immovables; and which officials.
8 That is counted 'permanent' which is granted subject to the good pleasure of a sovereign.
9 Unfairness of price indicates that dishonesty has entered into a contract. Dishonesty from unfairness of price; cf. above.
10 Sometimes there is breach of contract.
11 One who loans money to an official is said to bribe him.
12 More or less makes no difference in kind.
13 Who are called bankers.
14 What collectors (*coactores*) are.
15 A soldier may buy a city property in a province; and the reason why he may not likewise acquire country land.
16 Mendicant friars, especially of Saint Francis, are liable for taxes on the estates actually possessed by them.
17 Soldiers may not take their wives with them into a province.
18 Soldiers may not lease land.
19 A soldier may not make gifts to a concubine.
20 Soldiers may not let their animals[3] loose in the pastures or meadows of other people.
21 A soldier may not prefer charges.
22 A soldier may not be a deputy.
23 A soldier may not be a guardian.
24 A soldier may not be an informer.

[93] Such was the interest of the Emperor in the soldiers that, like a good head of a family, in many respects he granted them indulgence, and in many he put them under a prohibition. For, to begin with the matter of wills, a soldier may not leave as his heir any one he pleases, but only such persons as the law does not expressly forbid.

1 The law puts the ban upon a heretic;[a] likewise upon a woman who
2 3 is the object of disgraceful suspicion.[b] And a soldier may not name his
4 own slave as his heir without also emancipating him—but for a

[a] *Code*, I. v. 22.
[b] *Dig.* XXIX. i. 41, § 1.

[1] [For *de* read *dat.*—Tr.]
[2] [For *de* read *d(ictis).*—Tr.]
[3] [For *animalis* read *animalia.*—Tr.]

different reason.[a] The same is true of a bastard son, as Baldus has pointed out,[b] offering an explanation that to-day is very unusual, namely that (as he says) a higher standard of morality is demanded of soldiers than of other men. This explanation he applies also to *Digest*, XXIX. i. 41, § 1; and such was the decision rendered by Calcaneus[c] when consulted in regard to an actual case, which is particularly worthy of attention, especially in view of the conclusion above reached that these regulations still apply to soldiers of our times.

Soldiers are also forbidden to acquire land in the province in 5 which they are serving.[d] And they cannot do it by proxy either,[e] though this seems at variance with the statement elsewhere made that 6 it is permissible to do by proxy what one cannot do in person. For a noble may act through slaves to secure even sordid gains; just as an honourable matron may without criticism keep a tavern by employing a servant of low standing. This difficulty is considered at length by Tiraqueau,[f] who solves in two ways: (1) on the ground that a person is not said really to do what he accomplishes through another; and (2) he says that the question is whether the law regards the activity of the person.

My notion is that there is a better explanation on the basis of the distinction laid down by Baldus in another connexion,[g] namely that in regard to acts which are viewed with respect to their end and issue, and not with reference to the actor, it makes no difference whether a thing is done at first hand, or under one's direction by proxy; but in regard to those actions which are introduced as a matter of form, and in which a person thus functions, then a man who acts through the agency of another is not said to do the thing in question. Now in the above limitation upon a soldier's freedom it is the result that is held in view, namely that the men shall not desert the service, allured by the attractiveness of rural life.[h] (But a soldier may recover his own estates or even those of his father, [93′] if they chance to have escheated to the fiscus).[i]

And such purchasing is forbidden as well to prefects, governors, and also even to a commanding general and other officers of the Emperors;[j] so *Code*, I. liii. 1, where they are forbidden also to accept gifts. This subject presents no small difficulty; hence we must recognize a distinction:

(1) A man is an official with jurisdiction, and then he is forbidden 7 to engage in trade,[k] unless:

(*a*) he is holding office in his own country; or

(*b*) he is a permanent official (provided, of course, that he buys honestly. Note, too, that he also is called a 'permanent' official who is 8 appointed subject to the good pleasure of the sovereign);[l] or

(*c*) he buys things essential to living; again,

[a] *Dig.* XXIX. i. 13, § 3.
[b] *On Dig.* XXVIII. iii. 7.
[c] *Consilium* 59 (*Requisitus*), no. 5.
[d] *Code*, XII. xxxv. 15; *Dig.* XLIX. xvi. 13, at the beginning; *Dig.* XVIII. i. 46 and 62.
[e] *Dig.* XVIII. i. 46; *Dig.* XLIX. xiv. 46, § 2; *Dig.* L. viii. 2, § 1.
[f] *De Nobilitate et Iure Primogenituraе*, chap. xxviii, no. 7 to end.
[g] *On Code* VI. li, § 9, cols. 1 and 2, especially words *quidam sunt actus*.
[h] *Dig.* XLIX. xvi. 13.
[i] *Dig.* XLIX. xvi. 9; *Dig.* XVIII. i. 62.
[j] *Dig* XLIX. xiv. 46, § 2; *Dig.* XII.i. 33.
[k] *Code.* I. liii. 1; *Dig.* XII. i. 33 and 34; *Dig.* XII. i. 34.
[l] According to gloss on the *Constitutions of Clement* I. ii. 2.

(*d*) he deals with a non-subject. This, as Cino thinks, is limited by the further restriction that he must not buy to make a profit; and Baldus[a] quotes and follows.

(2) He is an official without jurisdiction, and enters into contracts touching things relating to his administration; and then he is out of order, even though he conducts the transactions openly. So Baldus[b] judged, in view (as he says) of the man's representative position —which is to say that a certain respectful attitude is demanded; and this view is supported by *Digest*, XVIII. i. 46 and 62, *Digest*, XII. i. 33 and 34, and *Code*, I. liii. 1, which make no distinction whether action is taken openly or secretly. (However, understand all this of an officer on a temporary appointment.) And although Bartolus[c] rules otherwise, as does Fulgosius,[d] the view above stated is the sounder, and the Doctors more generally accept it; see Jason on *Digest*, XII. i. 33,[e] a law which affords strong support in that it forbids engaging in trade, which, of course, is not usually a secret matter.

But if the official has business dealings outside matters involved in his administration, whatever he does is valid,[f] of course, if the transaction is conducted in good faith.[g]

9 Of one thing, moreover, be assured, namely that if the price is not found to be fair, good faith is not to be taken for granted—even if it be less than a half—so Baldus comments on *Code* IV. ii. 16. All of which applies to the officers of sovereigns and their staffs.[h]

In addition to the references above given, Baldus considers this subject in his *Consilia*.[i] There he takes the strange ground that an official is not held to a contract prejudicial to himself, which I should scarce dare to say, when on the bench. For I think that the above laws were enacted to the officials' discredit, being designed to check their plundering and roguery (hence a penalty is attached, even of fourfold 10 payment).[j] [94] Accordingly these laws should[2] not be distorted to favour the officials; for it would be more reasonable that there be breach of contract than that natural logic be outraged.

Regarding this, see *Code*, I. xiv. 6—a subject on which Felinus[k] brings many considerations to bear, in his usual fashion. And that it was in favour of the provincials that these laws were introduced is shown by *Code*, I. liii. 1, where it is stated that it is within the right of a donor to validate a gift after finishing his term of office.

In regard to loans, however, I admit that the regulations were made to the discredit of both parties. Hence both are punished, 11 according to *Code*, IV. ii. 16, where it is stated that he who makes a loan to an official is said to bribe him; see Baldus' comments there. And the same statement is made in regard to a banker who has advanced

[a] *Consilium* (*Statim allegando*).

[b] *On Code*, IV ii. 16.

[c] *On Dig.* XLIX. xiv. 46 § 2.

[d] *On Dig.* XVIII. i. 46, and XII. i. 33, word *mementote*.

[e] col. 3.

[f] According to Bartolus on *Dig.* XLIX. xiv. 46, § 2.[1]

[g] *Ibid.*

[h] *Code*, IV. xliv. 18, with comment.

[i] III. 333 (*Praemitto quod Iacobus Butr.*).

[j] *Dig.* XVIII. i. 46; *Code*, I. liii, 1.

[k] *On Decretals* I. iii. 26, el. 2, cols. 4 and 5; and II. i. 7.

[1] [For *Principe* read *praeside*.—Tr.]
[2] [For *debet* read *debent*.—Tr.]

money to a man in support of his canvass for office, both parties being severely penalized.

But as for the fact that *Code*, IV. ii. 16 and *Digest*, XII. i. 34 seem to be in conflict (in that one forbids obtaining money at interest and the other allows it), a gloss explains that one relates to a permanent official, who[1] may borrow,[a] and the other to a temporary official, who may not.[b]

[a] *Dig.* XII. i. 34.
[b] *Code*, IV. 2. 16.

Alciati,[c] however, has another explanation, namely that *Digest*, XII. i. 34, in point of fact is speaking of a higher magistrate named by the Emperor, while the other law has to do with lower officials, such as town officers. This distinction is not supported by the law, nor has it any analogy; moreover, greater or less makes no difference in kind. 12 Further, it is in conflict with *Code*, IV. ii. 3; and *Digest*, XLIX. xiv. 46, § 2 treats alike the governor himself, the procurator of the fiscus, and any others you will.

[c] *Parerga*, I. xxv.

Therefore, we should not reject the gloss and the common view, although there is no little difficulty with *Code*, IV. ii. 3 ('during the period of their office')—words which imply that the provincial officer is a temporary official; moreover, that the office of proconsul, propraetor, and other governors of provinces was not permanent, but temporary and annual, is indicated by many letters of Cicero, in which, while he was governor of Cilicia, he earnestly begs[2] his friends not to allow his year of office to be extended. Nevertheless, there is strong rebuttal in the explanation given in *Digest*, XII. i. 34 ('because they are permanent'); and in regard to governors this is stated also in the above mentioned *Report to Theodosius*.

(As for the function of the bankers mentioned in *Code*, IV. ii. 16, 13 Alciati[d] comments, holding that they are otherwise known as 'collectors' 14 (*coactores*). These are persons who undertake on commission to collect the rather bad debts of business men.)

[d] *Parerga*, I. xxiv.

It also is allowed a soldier to buy a city property; for here the 15 question of being lured from the service does not enter.[e] Moreover, if he buys property in the country and is mustered out before it is seized for the fiscus, his act is condoned.[f]

[e] *Dig.* XLIX. xvi. 13.
[f] *Dig.* XLIX. xvi. 13 and 9.

But may the governor himself buy a residence? The general tenor of *Code*, I. liii. 1 and *Digest*, XLIX. xiv. 46, § 2 implies that he may not. Further, in the laws cited, there is no distinction between city and country estates, [94′] and the logic of the above assumption applies equally to both; unless you should declare for the opposite view, on the ground that the man is a permanent official, in accordance with what I have said above in this same chapter.

Again, a governor is forbidden to construct a ship of burden, as is stated in the oft-cited *Digest*, XLIX. xiv. 46, § 2. The same rule is laid

[1] [For *quia* read *qui*.—Tr.]
[2] [For *regat* read *rogat*.—Tr.]

down for a senator in *Digest*, L. v. 3, near the end, where it is stated also that a senator has no exemption as compensation for providing a ship, because the law forbids him to own one.

16 (This has a bearing upon those orders of mendicant friars, especially of Saint Francis, who own immovables, namely that they are not exempt in the matter of taxes, since they hold those possessions in defiance of rule and law. So *Constitutions of Clement*, V. xi. 1; and this was stated earlier by others also.)

17 Soldiers are forbidden, too, to take a wife with them into the province where[1] they are serving, unless they secure permission from the Emperor. Both these points are proved by *Code*, XII. xxxv. 10 and *Digest*, XXIII. iv. 26, § 3. But this does not apply to the general himself, nor to the governor of a province; so *Digest*, I. xvi. 4, § 2, where a decree of the senate is cited dealing with this point—not to the effect that wives may not accompany husbands into a province, but that the husbands are held responsible for wrongs committed by their wives. Moreover as regards forbidding their going, there was once a very vigorous fight in the senate, but to no purpose; for the better faction opposed and fought it, as related by Tacitus.[a]

[a] *Annals*, III [xxxiii, ff.].

But yet I do not think that this rule was rigorously enforced in the case of common soldiers. For that wives were taken into the province is indicated by many laws, especially *Code*, II. li. 1 and 2, and XII. xxxv. 10.

And just as a soldier is forbidden to take with him a wife, so also he is forbidden to acquire and marry one in the province.[b] But he may do so, if an engagement has previously been entered into. And as for the engagement itself, this he may contract while in the province.[c]

[b] *Dig.* XXIII. ii. 65 and 38.

[c] See laws cited.

If he does marry a wife contrary to law, after the completion of his service the marriage is validated.[d]

[d] *Code*, V. iv. 6.

18 Again, in connexion with my remark above that the purchase of land is forbidden to soldiers, observe that the same is true if they desire to lease land. So *Code*, IV. lxv. 31, where a twofold reason is assigned, namely that they be not lured from the liking for war, and that they may not become burdensome to the neighbours and the provincials—a reason assigned also in law 35 of the same title, where the expression is noteworthy ('and making harsh use of their arms, not upon the enemy, but upon the neighbours and unfortunate tenant farmers, whom it is their duty to protect'). And there they are forbidden also to become surety for others who lease land. (See, too, the like ruling in *Code*, XII. xxxv. 15 and 16.)

19 Furthermore, a soldier is forbidden to make gifts to a mistress or courtesan.[e]

[e] *Code*, V. x i. 2.

20 Again, soldiers are forbidden to graze their horses in the fields belonging to the Emperor or to the provincials.[f] However, the town

[f] *Code*, XI. lxi. 2 and 3.

[1] [For *inqua* read *in qua*.—Ed.]

officials must see to it that provision is made for the pasturage [95] of the animals used by the soldiers, but without loss to the provincials.[a] From this it appears that such expense cannot be levied upon individuals—a rule little observed.

[a] *Code*, XI. lxi. 2.

Finally, soldiers are forbidden to bring charges, unless they are prosecuting for an injury to themselves or to their friends[b]—except in case of a charge of treason.[c] 21

[b] *Code*, IX. i. 8.
[c] *Dig.* XLVIII. iv. 7.

Likewise they are forbidden to act as deputies even for parents or wife.[d] (However, a soldier may attend to cases for himself[e]; so also for his division and company,[f] and when the status of some one connected with him is at stake[g]. But if this exception is not claimed before action is set on foot, it cannot be claimed thereafter.[h]) 22

[d] *Code*, II. xii. 7.
[e] *Code*, II. xii. 9.
[f] *Dig.* III. iii. 8, § 2.
[g] *Dig.* XL. xii. 3, § 1.
[h] *Code*, II. xii. 13.

According to Bartolus, the reason for the above prohibition is twofold, namely that the soldier be not called away from his tasks, and that he be not, for the opposing party, a more difficult and awe-inspiring antagonist than the principal himself could be; also[i] that soldiers be not busied with common tasks—especially men who are of higher rank. For such business is very demeaning; so *Code*, X. xxxii. 34 ('stooping to a very degrading cheapening').[1]

[i] *addit.* 3.

Soldiers are also warned against incestuous marriages,[j] the penalty attached being loss of belt and property, unless there be some other legitimate offspring for whom these may be reserved. In fact, if the culprit is of low rank, he is punished with the club and with exile, that he may learn to live decently, and to keep himself within nature's bounds.[k] And in this case ignorance of the law is no excuse.

[j] *Authent.* XII. chap. i.
[k] So *ibid.*

Likewise, a soldier is forbidden to become a guardian, even though it is so directed by a will.[l] But there is exception in the case of a ward who is the son of a soldier, as I have noted above among the privileges. 23

[l] *Code*, V. xxxiv. 4.

They are forbidden, also, to report derelictions to the fiscus. For this is the business of a low[2] and base person, and it is incompatible with the dignity of the service.[m] 24

[m] *Dig.* XLIX. xiv. 18, § 6.

In fine, by divine warning soldiers also are forbidden to injure the provincials, or to accuse them falsely.[n] For the business of war itself is sanctioned; but to engage in it for loot is not allowable. Yet in these days who is there who does not follow the colours with the idea of plundering, and of accumulating by fair means and foul? So with justice we might declare: 'There is none that doeth good, no, not one'.[o] And if there really are any, it could truly be said:

[n] *St. Luke*, iii. [14]; *St, Matthew*. xxii. [21?]; *Decretum*, II. xxiii. 1, 5.

[o] [*Romans*, iii. 12.]

Scattered they appear, on a vast flood floating;[p]

[p] [Virgil, *Aeneid*, I. 118.]

or again:

And rarer than a crow milk-white.[q]

[q] [Cf. Juvenal, *Satires*, VII. 202.]

[1] [For *utilitatem* read *vilitatem*.—Tr.]

[2] [For *flagitios.* read *flagitiosi*.—Tr.]

## CHAPTER VIII

### WHEN SOLDIERS ARE AMENABLE TO THE COMMON LAW ALONG WITH OTHER PEOPLE

### SYNOPSIS

[95]

1 An oath makes a soldier a sort of civilian.
2 In renouncing a *fideicommissum* a soldier forfeits an advantage.
3 A soldier in business falls under the jurisdiction of the judges of merchants.
4 A soldier needs to be shown no respect when it becomes necessary to oppose him with a weapon, just as if a robber.
5 A soldier recovers property held in common with another, only in proportion to his share. Hence:
6 A partner does not have or enjoy privilege because of having a privileged partner.
7 A soldier recovers what he has given for a discreditable purpose.
8 Other things being equal, the state of a person in possession is more advantageous.
9 A soldier who bears false witness falls to a court other than his own.
10 A soldier may not make an entry in his own favour in the will of a comrade-in-arms.
11 A soldier who is a heretic lacks testamentary capacity.
12 A soldier who prosecutes appears in the court of the defendant.

Aside from the cases that are specified by law to their advantage and profit, it might be said in a word that soldiers must use the common law like other folks; yet I choose to mention a few regulations that include them in the common lot.

1 In the first place, then, a minor who is a soldier is amenable to the common law, if he consents under oath to the alienation of his property. So *Code*, II. xxvii. 1; and while this is a law of the pagan Alexander, the principle is much more emphasized in the rulings of Christian
2 sovereigns.[a] Likewise a soldier is amenable to the common law, if by an agreement with his brother he renounces a *fideicommissum* from the father.[b]

So, too, in the case of *Code*, II. iii. 14, and II. xlix. 1 (with II.
3 xlvii. 1), and II. l. 5, and III. xiii. 7, where, if a soldier is engaged in business, he is put under the jurisdiction of the judge of that kind of business. And ecclesiastical judges would do well if they allowed this procedure in the case of their clerical subordinates engaged in trading.

A like decision regarding the application of the common law is found in *Code*, III. xxi. 2. So also in the case of *Code*, III. xxiv. 1, where it is ruled that, in the matter of crimes, privilege of court (from the rank of 'highly distinguished' down) does not avail to prevent trial for an offence in the district where it was committed. (This bears on a subject of which I spoke incidentally above[c] in the discussion of privileges.)

[a] In *Authentica* following *Code* II. xxvi. 1.
[b] *Code*, II. iv. 11.
[c] Part VII, chap. iii, no. 39.

So, again, in the case of *Code*, III. xxvii. 1; [96] for at night it is 4
permissible to oppose a soldier who is breaking in, just as you would
resist any other person, since no respect needs to be shown a soldier
who has to be opposed with a weapon, as if he were a robber.[a]

[a] So *Code*, III. xxvii. 1.

So, once more, in the case of *Code*, III. xxxii. 4, where military service is no protection against a *praescriptio* [*longi temporis*], if the period of the latter is complete at the time service began.[1]

So in the case of *Code*, III. xxxvii. 2, where a soldier reclaims only 5
his share of a common property that has been disposed of (hence a 6
partner does not enjoy privilege because of having a privileged partner
—except when he suffers an unfair division; and the same rule is
found in *Code*, IV. lii. 4[2]).

So, again, in *Code*, IV. vi. 4 [5], where what is given to a soldier for a definite purpose is recalled, if the purpose is not realized. Likewise in 7
the case of *Code*, IV. vii. 3, with gloss, where it is indicated that what was given for a discreditable purpose is recovered by the soldier, because (as the gloss claims) he was unsuited to military service, so that there was discreditable action only on the part of the giver; it follows, therefore, that if there had been such action on both sides, the giver would not have recovered. This is supported, further, by what is said in a gloss on *Code* IV. vii. 2.

These laws seem in conflict; but they can be reconciled in a different way than the gloss and the Doctors propose. For to say, in the case of *Code*, IV. vii. 3, that the soldier (as noted) was unsuited for service is assumption pure and simple, and in fact it is refuted by the introductory phrase of the law, which refers to him as 'a soldier'. Therefore, it could be said with better logic that a soldier is reimbursed, even though he has advanced money for a discreditable purpose, since the other also has acted discreditably in receiving it; and that this is due to the favour shown military men—which should be added to the other privileges above listed.

Such was the situation in the law cited. For there was extortion on the part of the man who accepted a bribe from the soldier, thus utilizing his position as an occasion for a crime (for, being put in charge of a levy, he accepted money not to enroll the candidate as a new recruit, though the latter, as I have said, had already been passed). The rule then is, according to *Code*, IV. vii. 2, that, other things being 8
equal, the advantage lies with the party in possession, though it may be otherwise by reason of favour shown to military men.

(However, against *Code*, IV. vii. 2 stands *Code*, V. xvi. 2, which says that property given to a mistress is restored to a soldier, and the reason is appended: 'because', says the Emperor Antoninus, 'I do not

[1] [For *cepta* read *coepta*.—Tr.]
[2] This *Code* reference should be read in connexion with the text here.—Tr.]

want my soldiers despoiled by their mistresses in this manner and through cajoleries'. We may reconcile by supposing that in *Code*, V. xvi. 2 there was no actual gift, but that an appearance of this was developed through buying the property ostensibly in the name of the concubine.

And yet it cannot be denied that this appearance was developed through real intent to make a gift. Moreover, there is difficulty with *Code*, IV. vii. 2. For I noted above, among the privileges, that what is given by a soldier for an improper purpose is recovered;[a] whereas in *Code*, IV. vii. 2 it is stated that the things given are not recovered. The real explanation is that in this latter law the person making the gift was not a soldier; and on this the privilege turns.)

[a] *Code*, V. xvi. 2.

9 Again, the soldier is amenable to the common law in the case of *Code*, IV. xx. 14; for if he has borne false witness, he is under the jurisdiction [96'] of the judge in question, just like a civilian. So in the case of *Code*, IV. xxi. 5. So also in the matter of taxes; for soldiers must be treated in the same way as other people as regards collection.[b] But this does not hold of the penalty of confiscation, when they fail to make declaration or are delinquent, as I have noted among the privileges.

[b] *Code*, IV. lxi. 7.

So, again, in the case of *Code*, IV. lxiii. 6, where, no less than others, soldiers are forbidden to journey into barbarous and heathen lands, passing beyond the bounds of the empire in the pursuit of trade.

Likewise, when a soldier performs acts that require the right and the standing of an heir; for he is assumed to have taken up an inheritance on the same terms as a civilian.[c]

[c] *Code*, VI. xxx. 2.

So when he kills a person by accident and not by design.[d] Again,
10 when he enters something for himself in the will of a comrade-in-arms;[e] for he loses the legacy, though, by privilege, he escapes the penalty. But there is exception in the case of a father writing in a legacy for his son.[f]

[d] *Code*, IX. xvi. 1.
[e] *Code*, IX. xxiii. 5.
[f] *Dig.* XLVIII. x. 11.

11 So, too, in the case of *Code*, I. v. 22; for the soldier, too, if a heretic, loses passive testamentary capacity, as is there stated.

12 Likewise in the case of *Code*, I. xxvi. 4, where, supposing injury to be inflicted upon a soldier, it is required that he appear in the court of the judge of the offending party. So in the case of *Code*, II. iv. 11, in that the birth of a son helps a soldier no more than other people to the resumption of a *fideicommissum* that he has renounced.

Further, soldiers remain in the power of their fathers.[g] Again, entrance upon military service does not remove a soldier from the jurisdiction of the court to which he had already been assigned.[h]

[g] *Code*, XII. xxxvi. 3.
[h] *Dig.* V. i. 7.

A more diligent investigator will find additional cases.

HERE BEGINS
THE EIGHTH PART OF THE WORK

# SOLE CHAPTER

## ON THE CRIMES OF SOLDIERS AND THEIR PUNISHMENT

## SYNOPSIS

1 A person evading military service commits a grave offence.
2 A father who surrenders a son for punishment rescues him from the same.
3 Straggler; who is so called.
4 Deserter; who is so called.
5 A deserter is punished more severely in consideration of the nature of the occasion and other circumstances.
6 A new recruit is punished with less severity.
7 A former offender is punished more severely.
8 *Digest*, XLIX. xvi. 3, § 6 interpreted differently than by other Doctors.
9 A deserter to the enemy is like a traitor.
10 *Digest*, XLIX. xvi. 3, § 11 differently interpreted than by others.
11 Intent is punished, even though it is not carried out.
12 To defraud a division of soldiers by misappropriating their pay is a serious offence.
13 The punishment of hanging is worse than that of the sword.
14 Punishment of the straggler.
15 How a man is punished who sleeps while on guard.
16 He who does not return to his friends when he can is like a deserter to the enemy.
17 Whether a man captured by the enemy has the right to make his escape, and when.
18 A man captured in an entrenched position has the same status as a deserter to the enemy.
19 A man who surrenders to the enemy forfeits the right of postliminy.
20 Accursius misinterpreted *Digest*, XLIX. xvi. 5, § 5.
21 The meaning of *praesidium*.
22 It is left to inference to determine whether a thing happened by chance or by design.
23 Past life sheds light on intent.
24 Those who promise largely should not be trusted overmuch.
25 Whether on any grounds it is possible to desert from one party to the other without loss to one's reputation.
26 A deserter to the enemy suffers[1] extreme loss of civic rights.
27 For no reason may a subject desert to the enemy.
28 [**97′**] The service should not be left at an unseasonable time, even by a man who is a non-subject.
29 A sovereign should beware of having in his army more foreign than native forces.
30 The holding back or postponement of pay is no just ground for desertion, and still less for desertion to the enemy.
31 Desertion from one camp to the other, though it may be excused on other grounds, is an act of inexcusable fickleness.
32 What is right, and not what is expedient, should be considered.
33 Honour often paid to deserters to the enemy, and rewards given to them.
34 To be excused, desertion to the enemy must be for a very cogent reason that appeals to all.
35 It is inexpedient for rulers to scorn deserters.
36 Treacherous men assume and lay aside allegiance with the changes of fortune.
37 If you must change sides, once is enough.
38 Towns which surrender to the enemy are guilty of betrayal, if they surrender voluntarily.
39 It is lawful to betray an enemy.
40 An earlier pledge is more binding than a subsequent pledge.

[1] [For *paciuntur* read *patiuntur*.—Tr.]

41 Faith kept with the enemy is not good faith, but treachery.
42 Towns are excused which surrender to the enemy under stress of great fear.
43 A deserter to the enemy is guilty of treason.
44 Punishment of spies.
45 Whether it is permissible for a man of high standing to spy out the plans of the enemy by pretending desertion.
46 Honour and disgrace are rated according to the standards of the state.
47 Intent and purpose qualify misdeeds.
48 Through eagerness to learn the plans of others, scouts fail to conceal their own secrets.
49 One who stirs up a mutiny should be executed.
50 How mutinous soldiers are to be punished.
51 *Digest*, XLIX. xvi. 3, § 21 interpreted differently than by others.
52 Loss of arms is a military offence.
53 New contingencies are not covered by earlier orders.
54 Anarchy reigns where military discipline breaks down.
55 Insubordination of a soldier calls for the death penalty.
56 Those who fall out of line are guilty of an offence.
57 Need abrogates privilege, or at any rate suspends it.
58 A soldier who resists his officer commits an offence.
59 It is no disgrace for soldiers to be flogged by their officers.
60 A soldier ought to expose his life to peril in defence of his superior.
61 A man is justified in looking out for his own safety, when the onset is such that it cannot be resisted.
62 The man who starts a retreat should be punished with death.
63 Sloth on the part of a soldier is a crime.
64 A soldier feigning illness is severely punished, even with death.
65 An officer who surrenders an entrenched position, even under fear of violence, is scarce excused.
66 He who surrenders an entrenched position to the enemy is guilty of treason.
67 [98] What varieties of treason there are.
68 He who fortifies and holds a citadel against the will of the Emperor is liable to the penalty for treason.
69 It is a capital offence to enter an entrenched position or stronghold by scaling the fortifications.
70 He commits a serious offence who strikes a comrade-in-arms.
71 Intoxication excuses a lapse.
72 A man who escapes by breaking through his prison is guilty of death; but not if he escapes by other means.
73 A prison guard who allows a prisoner to escape incurs the penalty of the latter.
74 A soldier who is disrespectful to a parent is excluded from the service.
75 A soldier leaving his post should be severely punished.
76 Punishments of soldiers.
77 Punishments are regulated in accordance with the strictness and the disposition of commanders.
78 Decimation of soldiers for deserting.
79 Soldiers ordered to take their meals standing, as long as they were in the service.
80 Corbulo was an inflexible general, severe even in regard to minor faults.
81 In the army, severity is better than mercy.
82 Soldiers condemned for the theft of a fowl.
83 Soldiers' biscuit, lard, and sour wine are an abundant supply and provision for the men.
84 Facility in securing pardon is an encouragement to wrongdoing.
85 Men avoid serious faults[1] when they know that there is no pardon for slight failings.
86 In army life there should be the least possible wrongdoing.
87 All punishments are discretionary with the Emperor.
88 A corporal or sergeant is responsible for the acts of his men.
89 A man dishonourably discharged may not remain in the place where the Emperor is.
90 Punishment for embezzling pay.

[1] [For *crimine* read *crimina*.—Tr.]

Above I have treated at length of the privileges of soldiers, and of their prerogatives and rewards. But inasmuch as some men are not lured to noble and courageous action by simple virtue and honour and the reward in many ways promised therefor, but yet are often kept within the bounds of the allowable by the penalty attached to crimes—according to the following;

Fearing the law, the wicked cease from sin—[1]

(for not only the state itself but also the military department would be unbalanced, and, as it were, [98′] weak in one leg or lacking an eye, if, after ordaining rewards for the good, it had not also enacted punishment for offenders), I now pass on to the crimes of soldiers—not those which are common to them and other men, but those which are peculiarly their own—and to the punishment of the same.

Thus, then, a man commits an offence in enrolling for service when he has not the right so to do. For, as I have already noted in another place, it was not allowed by the Roman laws to enrol for service at random;[a] and the higher the rank taken, so much greater is the wrong and the punishment.[b]

1 A much worse offence is committed by a man who has been accepted, and then evades service.[c] Hence also, a father who holds back his son is punished by exile and the loss of a part of his property—if, however, he does this when war is threatening. In time of peace, he is clubbed to death.

2 Mercy is shown the son, however, if later he is produced by the father; so *Digest*, XLIX. xvi. 4, § 11—a passage that usually is everywhere quoted by the Doctors in support of the principle that mercy is shown a son (to the extent of lighter punishment) when his father produces him in court. This is indicated also in *Digest*, XLIX. xvi. 13, § 6; and such is the comment of Saliceto,[d] Felinus,[e] and Alciati.[f]

Much greater is the wrong and the punishment of the father, if he goes so far as to mutilate a son to the end that he may be less fit for service.[g]

Very serious is the offence of the straggler and the deserter. He 3 is a straggler (as the very name indicates) who[2] lingers outside the camp and far from the colours, but with intent to return; whereas a deserter is 4 absent without such intent (just so, in a similar situation among slaves, a vagabond differs from a runaway). This is shown in *Digest*, XLIX. xvi. 3, §§ 2 and 3, and in XLIX. xvi. 4, § 13; though a gloss on XLIX. xvi. 3, § 3 recognizes a difference between 'being long away' and 'being away for a long time', holding that 'for a long time' is more than 'long'. The contrary is proved by *Digest*, XLIX. xvi. 4, § 13.

However, not every deserter is punished in the same degree, many 5

[a] See *Dig.* XLIX. xvi. 2.
[b] So *Ibid.*, at end.
[c] *Dig.* XLIX. xvi. 4, § 10.
[d] *On Code* IX. i. 14.
[e] *On Decretals* V. i. 8.
[f] *De Praesumptionibus*, reg. 1, praesumpt. 4.
[g] *Dig.* XLIX. xvi. 4, § 12.

[1] *Oderunt peccare mali formidine poenae.* [Cf. Horace, *Letters*, I. xvi. 52: *Oderunt peccare boni virtutis amore.*—Tr.]

[2] [A somewhat free translation of what is evidently a post-classical construction.—Ed.]

points being taken into consideration: whether he deserted in time of war or of peace,[a] also his rank in the service, the number of his campaigns, and his past record (either to determine with what intent he was away, or that his punishment be made less or greater in accordance with his past record). So, too, the place, the circumstances, and finally, the actual outcome are considered—and whether he was away alone, or went off in company with many, and perhaps drew them on by his example; whether he is a new recruit[1] or an old soldier; and if a 6 7 new recruit, whether it was a first offence or not. As these considerations vary (some being of less or more importance than others), so they augment or lighten the punishment; for in some cases these men are reduced to lower rank, in others they are deported, and sometimes they are even executed. Such are the rulings in *Digest*, XLIX. xvi. 5, §§ 1 and 4; XLIX. xvi. 13, § 6; XLIX. xvi. 5, § 3, and XLIX. xvi. 3, § 9, [99] where it is shown also that a second offence is punished more severely.

[a] *Dig.* XLIX. xvi. 5.

And as the dereliction of a straggler is less, so also is his punishment lighter. And in his case, too, the reasons are looked into[2]—why he was absent, where he was, and what he was doing, allowance being made for ill health, for love of parents, and even of family connexions, or if he was in pursuit of a horse or a slave that had run away—possibly even if he hurried off to see his mistress, as our soldiers frequently do.

For that such a fault may be condoned, the action of a Roman general shows; for, on learning that a certain soldier, an otherwise efficient man, was often passing the night outside the camp for love of a courtesan, he gave orders[3] that the woman be summoned, and, presenting her to the soldier, said: 'From now on I shall find you more attentive to business.' However, do not proceed to emulate that soldier in his fault, but in his courage; for not all leaders are so considerate.

Furthermore, both straggler and deserter should have an opportunity to present their case, and to show that they were absent under such conditions that they deserve pardon or a milder punishment. So *Digest*, XLIX. xvi. 3, § 7; and see below.[b]

[b] No. 14.

In like case with the deserter is the man who fails in attendance (*executio*) upon a commander[4] or governor[c] (this[5] I take to apply to the suite (*sequela*), as being derived from the verb *sequor* ('follow')—others 8 may understand it as they will); for that man is little short of a deserter who fails to attend his commanding officer. What the gloss there[d] understands in regard to an *exsecutor* is not at all in point.

[c] *Dig.* XLIX. xvi. 3, § 6.

[d] *Ibid.*

Most serious is the crime of the deserter to the enemy, his act differing little from betrayal. Such a man is to be counted an enemy, 9 and not a soldier;[e] and it is no wonder that he may be put to torture,

[e] *Dig.* XLIX. xvi. 7; *Dig.* XLIX. xv. 19, § 4.

[1] [For *Tiro ne* read *tirone*.—Ed.]
[2] [For *examinantut* read *examinantur*.—Tr.]
[3] [For *iuscit* read *iussit*.—Tr.]
[4] [For *propositi* read *praepositi*.—Tr.]
[5] [Modern texts of the *Diges* read here *excubatio* ('watch'), which would call for no discussion.—Tr.]

thrown to wild beasts, or even hanged[1]—punishments degrading to a soldier, as was pointed out in the discussion of privileges.[a]

In fact even the man who starts[2] to desert to the enemy, and who
10 (to quote the comic poet) 'arranges[3] flight',[b] is counted a deserter, and, if caught, is executed; so *Digest*, XLIX. xvi. 3, § 11, near the end. This seems the more obvious meaning than to say with the gloss there: '*volens* signifies one who *voluntarily* deserts to the enemy' (on this see gloss and Doctors on *Digest* I. viii. 11). For who will be designated as 'caught', unless a man taken in the act—i.e. in some very serious act, and when he has already begun[4] to perpetrate and accomplish the crime? Again, simple intent is punished with the penalty of accomp-
11 lished[5] crime (on this see Baldus[c]). And what man deserts to the enemy except 'voluntarily'? Furthermore, support is found in a passage in *Digest*, XXI. i. 17, § 8.

And there is no doubt that if a deserter to the enemy compounds this wrong with another, he deserves a severer punishment (for even the manner of death was made more painful). A case in point is that of those two Allobroges[6] [99′] in Caesar's army, who were reprimanded by him for making false reports as to the number of horsemen and appropriating their pay.[7] Deciding to go over to Pompey, these Gauls planned to kill a cavalry commander; not succeeding in this, they raised a large loan in Caesar's camp, and deserted to the enemy, as Caesar himself records in his *Commentaries on the Civil War*.[d]

And to touch on this point in passing (though, as a matter of fact, it is not foreign to my topic or to this work), it is no light crime to make a false report of the number of soldiers, and to appropriate their pay;
12 and the penalty for so doing is severe. So it is ordered in *Code*, I. xxvii. 2, § 9 by the Emperor, whose exact words I have thought good to quote: 'For generals and tribunes', he says, 'aside from the emoluments provided for them should look rather to my liberality for the reward of their services; and they should not seek to enrich themselves through the leaves of absence of the men[8] or their wages.' For, says he, soldiers are appointed for the defence of the province; and provision is made for the emoluments and pay. And they ought to look for advancement[9] to higher rank and for the attainment of better positions as a result of their labour and services, without seeking these base gains. Such is the statement there. But this is little regarded to-day by our captains (as they are called) both of foot and horse; for they have no more certain income than what they derive from this sort of dishonesty.

[a] See *Dig.* XLIX. xvi. 3, § 10.

[b] [Cf. Terence, *The Eunuch*, 673: *adornarat fugam*.]

[c] *On Code* I. iii. 5, col. 2, oppo. 6.

[d] [III. lix ff.]

[1] [Or, crucified.—Tr.] [2] [For *cepit* read *coepit*.—Tr.] [3] [For *qui exornat* read *exornat*.—Tr.]
[4] [For *ceptum* read *coeptum*.—Tr.] [5] [For *consumati* read *consummati*.—Tr.]
[6] [Egus and Roncillus.—Ed.]
[7] [i.e. they kept the names of dead men on the roll, and collected their pay.—Tr.]
[8] [For *commeatis* read *commeatibus*. The leaves of absence were paid for by the soldiers. For this ancient abuse, cf. Tacitus, *Histories*, I. xlvi.—Tr.] [9] [For *provei* read *provehi*.—Tr.]

But, to come back to the subject of deserters, in the annals of the ancients also we read that such men were very rigorously punished in those days. 'The punishment of the deserters', says Livy,[a] 'was more severe than that of the runaway slaves; for those who had Latin rights were beheaded, and the Roman citizens were crucified.' (This goes to prove what I said above, namely that slaves were punished less severely than free men, and citizens more severely than allies or foreigners; and that the punishment of hanging[1] is worse than that of the sword.) In another place[b] Livy says again: 'Three hundred and seventy deserters were recovered; and when these were sent by the consul to Rome, they were all beaten to death with rods in the *Comitium*, and their bodies were thrown down from the Tarpeian Rock.'

With regard to my statement above about stragglers, namely that they were never punished with death, there is this exception: unless they remain away when the enemy are close at hand, or withdraw from the intrenchments[2] at such a crisis.[c]

But the man who leaves a picket-post is worse than a straggler; and he is disciplined in accordance with the character of his act.[d] (Generals of our day punish with death, not only the man who deserts his post, but also one who there falls asleep. This I think a barbarous proceeding, except when the situation is critical, e.g. when the enemy are close at hand. For such culprits, therefore, the punishment should normally be less than death.[e]) Further, a deserter from the Emperor's watch was executed.[f]

[**100**] Like to the deserter is the man who, after being captured by the enemy, fails to return to his people when there is opportunity.[g] For he who at heart is with the enemy has really abandoned his own people and become a deserter, as is stated in *Digest*, XLIX. xv. 5, § 3, and 12, § 9.

And this renders doubtful what was said by Petrus de Ancharano[h] (who is quoted and followed by Aretinus;[i] and both are cited and followed by Natta[j]), namely that, since even to-day in a war waged by Christians against the Turks the rights of capture and enslavement are in force, men who are captured will have no right to escape from their owners; for I do not think this true without reservation. In fact such persons ought ever to have escape in mind, and to accomplish it at the earliest opportunity, if they would avoid being classed with deserters to the enemy.

And this point is excellently treated here by Aretinus, who says that it is not permissible for such people to escape with the idea of living in freedom among those enemies and foreigners (for that is to make a theft of themselves); but that it will be lawful, if they escape with the idea of returning to their own people—as many of those Spaniards did who were captured at Castelnuovo in Illyricum.

[a] [XXX. xliii. 13.]

[b] [XXIV. xx. 6.]

[c] *Dig.* XLIX. xvi. 3, § 4.

[d] *Dig.* XLIX. xvi. 3, § 5.

[e] Same law.

[f] *Dig.* XLIX. xvi. 10; and Martinus Laudensis, *De Principibus*, qu.[3] 182.

[g] *Dig.* XLIX. xvi. 5, § 5.

[h] On V. xii. in *Sext*, reg. 4.

[i] *On Dig.* XXVIII. i. 13.

[j] *Consilium* 284, no. 6.

[1] [Or, crucifixion.—Tr.] [2] [*fossato* is now read for *fossa*.—Tr.] [3] [For *on*. read *qu*.—Ed.]

However, it perhaps is not unreasonable to restrict this last so that the privilege will hold merely as long as war is in progress, whereas when peace has been made with a compact following, perhaps it will not be permissible to escape, unless a separate agreement is made regarding prisoners; for when a war is over, there is a lapse also of the law of war and of nations that allows one party to acquire at the expense of the other. And to my mind this is proved by a phrase in *Digest*, XLIX. xv. 5, near the beginning ('For if a person returns during the same war'); for these words 'during the same war' would be superfluous, if it were permissible to return at all times. However, I fancy that no one would be as punctilious as this. Moreover, it is the law that I am setting forth, and not what the actual practice is, nor yet what it should be.

In like manner, a person is regarded in the light of a deserter to the enemy who goes over to them in time of truce, or who even makes his way to foreigners with whom there is no war, nor any treaty or friendship.[a]

[a] *Dig.* XLIX. xv. 19, § 8.

18 In *Digest*, XLIX. xvi. 5, § 5, the more drastic rule is laid down that the man who is captured in an entrenched position is on the same footing as a deserter to the enemy. This is extremely severe—that fear of violence at the hands of the enemy should work as much ill to a soldier as the shameful purpose of deserting one's party. Yet Accursius here so understands this law. And the principle is even more clearly maintained in *Digest*, XLIX. xv. 17 and 19, § 4; for in these two pas-
19 sages it is ruled that the man who surrenders when overcome by force of arms,[1] as well as the man who deserts to the enemy, loses his right of postliminy.

20 However, on *Digest*, XLIX. xvi. 5, § 5, Accursius is wrong in explaining *praesidio* as 'scouting' or spying', as if it were derived from
21 *praescio* ('learn in advance'). For *praesidium* signifies an entrenched and fortified post that is guarded and defended by soldiers. 'The army recovered the citadel',[2] says Livy,[b] 'for its first attack had instantly dislodged the men in the fort (*praesidium*). Marauders slipping away from the fort [**100**'] without leave had made possible this attack'.

[b] [IV. liii. 9.]

Once more, *praesidium* is a designation for the military force set to defend a place. Says Livy again:[c] 'He sent a messenger also to Regium, to the commander of the garrison (*praesidium*) which had been stationed there by the consul.' So at another point:[d] 'The Hirpinians and Lucanians surrendered, delivering up the garrisons (*praesidia*) of Hannibal which were in the cities.'

[c] [XXVII. xii. 4.]

[d] [XXVII. xv. 2.]

In a far different signification, *praesidium* is used metaphorically[e] of the money which the prudent head of a household lays aside for

[e] *Dig.* XXXII. lxxix, § 1.

[1] For *armis victis* read *armis victus* (cf. the *Digest* reading *armis victi*).—Tr.]
[2] [For *Arceram* read *arcem*.—Tr.]

emergencies. (Hence that quotation by Celsus to the effect that money without a reserve is a poor reliance.[a])

[a] *Dig.* XXXII. i. 79.

But, to return to my subject, it is indeed hard that those who have suffered extreme ill fortune, surrendering only after being overcome by force of arms, should lose the right of postliminy, and even be subject to punishment, if they chance to make their way back to their own people. Still we may say with the Jurisconsult[1] in *Digest*, XL. ix. 12, § 1: 'It is indeed hard, but it must be endured; for thus it is ordained.'

There was a case of this sort in former days after the battle of Cannae,[b] when some thousands of Romans, who were in the camps, surrendered to Hannibal. They might have been ransomed at a low figure; and the government was so short of soldiery that it bought up eight thousand slaves and enrolled them in the army. Yet it would not agree that those surrendered men be ransomed at public expense; and even if they were ransomed with private funds, it nevertheless ordered them not to remain in Italy nor to serve there. And if they served elsewhere, they were to receive no rewards or honours; and they were not to return to their homes, so long as Hannibal was in Italy.

[b] [Livy, XXII. lix. 12 ff.]

But if a soldier while on a journey falls in with the enemy, who make him a prisoner, he is pardoned on proving this.[c] And in case of 22
doubt, when it is not known whether the man was captured or whether he really deserted, recourse is had to inference, and his past record is looked into. If previously he has proved a good soldier, his statement at this 23
time is credited; but if he has been a straggler, or idle, or careless, his word will not be accepted, especially if he has come back after being away a long time; see the laws cited.

[c] *Dig.* XLIX. xvi. 3, § 12; XLIX. xvi. 5, § 5; XLIX. xvi. 5, § 7.

This needs to be weighed carefully in regard to soldiers of our day, particularly those Italians of the rank and file, who are in the habit of passing over from one army to the other with the greatest readiness. For if under examination they try to excuse themselves on the ground that they were captured and did not desert, credence will scarce be given them unless in accordance with the distinction above made.

But to-day this charge and this crime are lightly regarded because of the agreements which are often made, both in war and in peace, to the effect that if deserters are captured, they shall be regarded as on the same footing with all other soldiers. Furthermore, blame attaches to those whom we call captains and colonels. For, when raising new levies and enrolling new companies, they proceed without making strict examination, and care for nothing else than filling their quota, hiring and buying up the men like cattle, at the lowest possible price. And there is no one to recall to a strict standard; in fact, [**101**] perhaps this would not be profitable for those who to-day are engaged in the struggle over hapless Italy.

[1] [Ulpian.—Ed.]

However, there is pardon for deserters to the enemy in a single case, namely when they give information with regard to brigands and other
24 deserters, or win this immunity by some like outstanding service. But even so, ready credence should not be given to those who promise much.[a]

[a] *Dig.* XLIX. xvi. 5, § 8.

Before I proceed to other topics, I desire to linger a little over this matter of deserters to the enemy, inasmuch as the practice is of frequent occurrence in this unhappy and corrupt age of ours. For on all sides we see occasional Frenchmen, and many more Italians, deserting from the French army to the imperial and Spanish army, and, on the other hand, Spaniards and Germans, and these selfsame Italians deserting from the latter army to the former. More shocking still, many, especially the Italians (I am speaking of the common men of the rank and file; for the nobles abstain from this evil practice) are in the habit[1] of crossing repeatedly from one army to another with greater frequency than bees fly from the flowers to their hives.

25 We must consider, then, whether this sort of thing was allowed either by the practice of the ancients or by their law, and when it was permitted. In the first place, then, I think we should distinguish between subjects and non-subjects (here under the general designation 'subjects' I include also vassals and many others who by birth or domicile are in a dependent relation).

As for subjects, I hold that desertion to the enemy is absolutely forbidden. Consequently no explanation or plea excuses them—even supposing that they are defrauded of their pay, or dismissed from service, or, finally, even that they have escaped from prison and changed their place of residence. For without the guilt of treachery what man may join the enemy and bear arms against his sovereign and his country?—when even a person who plots against its prosperity is open to the charge of rebellion and treason (as in *Extrav. Decretales*, § '*qui sint rebelles*',[b] which has reference to mere verbal injury, according to a gloss there), and when even one who disobeys orders is guilty of this crime?[c]

[b] *Feudorum Libri*, F. App. tit. 3, word *machinari* [*machinantur*].

[c] *Ibid.*, words *rebellando* and *tenore*.

26 Consequently deserters of this sort deservedly suffer extreme loss of civic rights.[d] For what valid excuse can be found in the stopping of pay?—for we see that in fact the provincials provide rations; moreover, even deserting the service is less blameworthy than deserting to the enemy; and, finally, we read in Xenophon[e] of the Spartans who were serving in the island of Chios under Eteonicus, that to the end of the summer they lived upon the things which they gathered from the fields with the consent of the owners, even working for wages, as pay was not forthcoming, being determined not to abandon the task imposed.

[d] *Dig.* IV. v. 5, § 1.

[e] *Hellenica*, II. [i. 1].

Again, what valid excuse can there be for those who leave their

[1] [Strict symmetry would require *solere* for *soleant*.—Tr.]

country as a result of crime, heaping wrong on wrong? For though he was the best of men, and had been condemned with the greatest injustice, not even Socrates thought it right to break the laws and to escape 27
from prison, [**101**′] as is described by Plato in the dialogue called *Crito*. Desertion to the enemy, therefore, is absolutely forbidden to subjects.

But the case of the non-subject is very different. For he is held by honour only; hence its claims must especially be taken into account. 28
Such a one, then, may not abandon service at an unseasonable time, just as, in contracts, it is not permissible for a partner to withdraw from a partnership at an untimely juncture.[a] This fits with what I have said above, at the beginning of this work,[b] in regard to a vassal who deserts his lord in war, but not in actual battle. Who would not justly condemn the action of the Celtiberians, who were serving with the elder[1] Publius Scipio in Spain? For, won over by Hasdrubal with the help of a bribe, they deserted the Romans in the very crisis of the action, the enemy being close at hand, thinking this no heinous crime in that they were not actually attacking the Romans, though, as a matter of fact, they were leaving them to be butchered by the enemy, as the event proved.[c]

(These are the Celtiberians whom the Romans first employed as mercenary soldiers, as Livy[d] writes, adding that this episode should be 29
a perpetual example and a never-to-be-forgotten warning that generals[2] should not put such reliance upon foreign soldiery that they fail to maintain a large preponderance of their own forces and troops[e]—a rule which the Romans consistently observed, according to Vegetius.)[f]

In like manner, almost in our times, Ludovico Sforza, whom they still call 'the Moor', through the defection of the Swiss lost Milan, and fell into the hands of Louis XII, King of France. Therefore, mercenary[3] soldiers and auxiliaries will do wrong in deserting under such circumstances.

In the case of a vassal, Baldus[g] calls this treachery, even when the man is not pledged to aid the lord. And with this de Afflictis[h] agrees, adding that, even in the case of non-vassals, one who so behaves is responsible *ad interesse*.

And for non-subjects, too, I should not count it a legitimate 30
excuse, if they absent themselves on account of arrears in pay (a common contingency in war times)—provided, however, that they are able to secure food from other sources, or that the ruler[4] meanwhile looks out for their subsistence—particularly as this can be done, if care is exercised, through the help of the provincials and without expense or loss to them (namely, by deducting the cost from the pay, when there

[a] *Dig.* XVII. ii. 14.
[b] [Part II, chap. v, no. 9.]
[c] [Livy, XXV. xxxii. ff.]
[d] XXIV. [xlix. 8.]
[e] [XXV. xxxiii. 6.]
[f] *Rei Militaris Instituta*, III. i. at end.
[g] *On Feuds*, Bk. I, tit. XVII, chap. i, near the beginning, 2nd phrase (*quaerit glos.*).
[h] *Ibid.* col. 5.

[1] [Father of the victor in the Second Punic War.—Tr.]
[2] [For *Principes* read *princeps*, or change the verb to the plural.—Tr.]
[3] [For *mercenari j* read *mercenarii*.—Ed.]
[4] [For *Principes* read *princeps*.—Tr.]

is cash in hand, thus making payment for the goods taken. This, however, is not the present practice; but it would be the act of an excellent sovereign to introduce it).

However, if there is legitimate ground for withdrawing, and the departure does not fall at an unseasonable time, and if leave and permission to go is asked, I think that it is possible to withdraw without
31 incurring disgrace, especially if a man goes to his home, and not to the enemy; for even in the case supposed, a man could hardly cross over
32 from one camp to another without being guilty of fickleness, to say the least, particularly among Christians, who ought to judge of things on the basis of what is right, and not on the basis of their personal advantage; for I have already noted above that it is not permissible for a mercenary soldier to aid one unjustly engaged in war.

33 Yet, [**102**] in history we read that honour was paid and rewards were given to many deserters and persons who crossed over from one party to another. So at Arpi, in the Second Punic War, a little less than a thousand Spaniards, who were there on guard duty for the Carthaginians, went over to the Romans, after making the condition that it be allowed the Carthaginians who were with them to depart unmolested. And the Romans subsequently found their service to be valiant and reliable. So Livy.[a]

'On account of some pique, I suppose', says Livy at another point,[b] 'or because of the prospect of more genteel service,[1] two hundred and seventy-two horsemen (both Numidian and Spanish) deserted to Marcellus. During the war the Romans found their service reliable; and later, as a reward for their valour,[2] land was assigned to them—to the Spaniards in Spain, and to the Numidians in Africa.'

Livy again relates[c] that Sosis, a Syracusan (through whose betrayal Syracuse was taken at night), and Moericus, a Spaniard (who had betrayed Nasus,[3] the heart of Syracuse), were given generous rewards, Sosis receiving five hundred half-acres of land and a residence at Syracuse, while to Moericus and his Spaniards were given the city of Murgantia and estates in Spain.[4] Furthermore, the person who had enlisted Moericus was given four hundred half-acres of land in Sicily. Muttines also, an African, was actually given citizenship.[d]

And Livy says that before this time those of the Veientines,[5] Capenians, and Faliscans[6] who had deserted to Rome were made citizens, and presented with land. So sensible were the Romans of benefits received, and so punctilious in repaying a favour.

It would not be seemly to number among deserters King Masinissa, who was so eminent a king and so steadfast a friend to the Romans;

[a] [XXIV. xlvii. 8 ff.]

[b] [XXIII. xlvi. 6 ff.]

[c] [XXVI. xxi. 9 ff.]

[d] [Livy, XXVII. v. 7.]

[1] [After *militiae* omit *mille*.—Tr.]
[2] [After *causa* omit *latus*.—Tr.]
[3] [For *nassum* read *Nasum*.—Ed.]
[4] [As a matter of fact, these grants were in Sicily.—Tr.]
[5] [For *vcientum* read *Veientum*.—Ed.]
[6] [For *Faliscorem* read *Faliscorum*.—Ed.]

though, as a matter of fact, he[1] had long fought on the side of the Carthaginians. But he went over to the Romans with large honour to himself, and with dignity and nobility. For, being the most powerful of all the rulers of his day, he broke off one friendship, and held and cherished the other steadfastly down to extreme old age. Both in former times and in our own day, many others might be cited as securing honour and emolument by such transfer of allegiance. But no one of them is to be classed with this king.

And, to conclude, I think it more fortunate and honourable if a 34
person remains faithful to one ruler only. But if it becomes necessary to go over to the other party, it should be for a reason so pressing, so manifest, and so justified in the eyes of all that honour and reputation be safeguarded above all else.

Rulers, on their part, should beware of esteeming deserters lightly 35
and of forgetting to reward and honour them. For in failing to meet the claims of decency and generosity, they are not looking out for their own advantage either; for, warned by the experience of those who have been shown scant courtesy, other deserters will take greater precaution in looking out for their interests. Yet I know persons who were promised mountains of gold, and who, after desertion, lacked for bread, and—save the mark!—they lack it still;—but, as the old saying has it, Plato forbids to go into particulars.

And there are men who are faithful to their party as long as they see 36
fortune ranged therewith; but when fortune wavers, [**102**′] then they too change[2] allegiance with it. These I shall warn by a single example what they had better do, if they desire to look out for themselves.

Altinius had caused his city Arpi to desert to Hannibal after the disastrous battle of Cannae. Later, when he saw the Roman interest recovering and in the ascendant, he changed his mind and came secretly by night into the Roman camp, promising to deliver up Arpi for a consideration. The matter was referred to a military conference, and the consul delivered the opinion that the man ought not to be trusted, but rather flogged, and executed as well, being a person who shaped his policy and changed his allegiance with mutations of fortune. But, on the other hand, Fabius, who was father and lieutenant to the consul, claimed that they ought to take into consideration the time and the situation. At length it was agreed that Altinius should be detained, and sent away secretly to a friendly state, there to be held in custody, so that after the war was over they might dispose of his case.[a] This is the end and the fate of such persons.

[a] [Livy, XXIV. xlv.]

I repeat the caution that no one should desert hastily, nor for 37
slight cause, nor yet[3] frequently, even though there be a valid reason.

[1] [For *ipsi* read *ipse*.—Tr.]
[2] [For *muttant* read *mutant*.—Tr.]
[3] [For *ne ve* read *neve*.—Ed.]

Indibilis, a Spanish chieftain, on deserting along with his brother Mandonius from the Carthaginians to Scipio, thus spoke: 'I am well aware that the name of deserter is a hissing to former friends and a matter of suspicion to the new. But the occasion, and not the mere name, ought to be considered.'[a] These points, therefore, should be pondered by those who meditate desertion.

[a] [Livy, XXVII. xvii. 9 ff.]

38 Again, a sort of desertion and betrayal[1] is perpetrated by towns which voluntarily go over to the enemy. The nature of the punishment called for by such action is gathered from its result and the verdict of the injured lord; and this is shown by an ever-to-be-remembered example.

After the above-mentioned disaster at Cannae, Capua deserted the Romans, and many other cities and peoples followed suit; later it was recovered by the Romans through force of arms. The consuls who conducted the siege directed that all the senators taken alive should be beheaded; and they confiscated the goods of others who had escaped.[2] The children and wives were sold as slaves, excepting daughters who had married before the city was stormed. Other nobles were thrown into prison, with intent to look into their cases later. This you will find at greater length in Livy.[b]

[b] XXVI [xiv. 7 ff.].

But the fault of the Capuans was aggravated by the fact that they, a powerful state, allied and friendly, and in fear of no violence from the enemy, had been first to desert, and by their example, too, had wrought injury. On the other hand, at that same period, when the Hirpinians, Lucanians, and Volscians, after surrendering Hannibal's garrisons, gave themselves up to the consul Quintus Fulvius, they were more mercifully treated by him, being given a mere verbal reproof for their past wrongdoing.[c] For they too had deserted with the Capuans, but were received back with clemency; so much difference does it make whether people return voluntarily, or under compulsion, to the former lord.

[c] [Livy, XXVII. xv. 2.]

39 And, to touch on this point in passing, I think the peoples named
40 above are deserving of praise for thus deserting Hannibal. For an
41 earlier allegiance should take precedence over a later, inasmuch as the later rests, not on honour, but on perfidy, or at any rate on violence and intimidation; [**103**] and the earliest possible opportunity to get clear of it cannot be neglected without blame, as has already been said above of the captured soldier, whose failure to return to his people at once, when there is opportunity, puts him on the footing of a deserter.[d]

[d] *Dig.* XLIX. xvi. 5, § 5.

Consequently I do not acquit of wrong and blame many towns in this Piedmont district of ours, which in the recent wars were occupied by garrisons of the enemy, and though occasion frequently offered, and

[1] [For *proditiones* perhaps *proditionis* should be read.—Tr.]
[2] [*evaserant*, i.e. *evaserant*.—Tr.]

few soldiers were on duty,[1] they either feared or neglected to declare for their former lord. So far am I from charging with treachery a man who takes the opposite course.

It makes a great difference, moreover, whether a state deserts to 42
the enemy, or whether it is invaded with armed force by them and seized. In one case the wrong is great, and it may be punished severely; but what wrong is done by those who are coerced? Or how much less are they to be esteemed than formerly, if they are recovered? The
[a] [VI. iii.] Aequians,[2] says Livy,[a] were besieging Sutrium, a city allied with the Romans. When the Sutrians could hold out no longer, they surrendered their city. After recovering it by force of arms, the Romans restored it to the townspeople unscathed and uninjured by themselves or by the enemy; for the latter had not plundered it either, because they had taken it by surrender.

The army was then conducted from Sutrium to Nepete, which was held by the enemy, who had taken it by surrender, a faction of the Nepesines delivering over their city. But when it, too, had been recovered by force of arms, those responsible for that surrender were beheaded, while to the unoffending mass of citizens their property was
[b] [Livy, VI. x.] restored.[b]

(I would that such examples were kept before the eyes of the generals, prefects, captains, and soldiers of our armies, who plunder the unhappy districts that without any fault on their part have fallen into the hands of the enemy—in fact (more's the shame!) sometimes even through the carelessness of our soldiers, and perhaps even by the treachery of some of them. But whether they retake these places by force of arms or even by surrender, they plunder as heartily, and abstain not a whit more[3] from murder, debauchery, and pillage, than if they had taken a city of the Turks at the cost of much labour and bloodshed.)

And it is not strange that in that distant age mercy was shown to the coerced and the innocent. For the states of that time were so considerate and fair that, in the case of peoples whom they were not strong enough to defend from the enemy, they allowed and even urged them to consult their own interests and to give allegiance to the foe.

In the Second Punic War, the Petelians asked the aid of the Senate against the Carthaginians. On reviewing the forces of the government, the Romans were forced to confess that they had not strength enough to help these far-away allies; the latter might therefore consult the interest of their own state, inasmuch as they had satisfied
[c] [XXIII. xx. 4 ff.] every claim of loyalty to the full. Thus Livy.[c]

The Spartans, too, acted nobly, according to the record of

[1] [For *remansisset* read *remansissent*.—Tr.]
[2] [The reference is to the Etruscans, not to the Aequians.—Tr.]
[3] [The sense requires *magis* for *minus*.—Tr.]

Xenophon.[a] For when Polydamas of Pharsalus had come to Sparta to beg for help against Jason the Thessalian, after spending all [**103′**] his own resources, they confessed that they were not in a position to assist him; therefore, he might depart and take measures for his own safety and that of his state.

[a] *Hellenica* [VI. i. 2 ff.]

The above cases were less complicated and clearer, the following much more difficult. The Athenians were besieging Byzantium (the Constantinople of to-day), and the Spartan commander, Clearchus, who was within, apportioned to his soldiers all the grain to be found in the city. Thereupon the townspeople betrayed the city to the enemy; and when at Sparta the ringleaders were charged with treachery, they appeared there and made the following plea: 'We aimed not so much to betray the city as to save it; for we saw all the people perishing of hunger[1] and privation.' On this plea they were acquitted and allowed to go.[b]

[b] [Xenophon, *Hellenica*, I. iii. 15 ff.]

To our generals all this would seem moonshine and old wives' fables. And what those nations did solely under the guidance of natural reason, this our generals forget—namely, to regard right and justice and the safety of peoples; yet they are persons who never set out from home without divine service and attention to the claims of religion.

That those cities are excused which surrender to the enemy under stress of well-grounded fear is held also by Imolensis,[c] Socini,[d] and Decio;[e] and so Felinus[f] states. I apologize for lingering over these small details that are so remote and foreign to the purpose of our work; but, having told of the punishment of the Capuans, I cannot refrain from relating also how, in that selfsame city of Capua, favour was recompensed and repaid to those who were found to have served the interests of the Romans.

[c] *Consilium* 34, *dub.* 2.
[d] *Consilia*, III. 39, no. 8.
[e] *Consilium* 690, no. 14.
[f] *On Decretals*, II. ii. 13, last col.

It was discovered, says Livy,[g] that there were two women, Vestia Oppia and Pacula Cluvia,[2] of whom the second, a courtesan, had secretly supplied food to Roman prisoners who were in dire need, while the other had daily made sacrifice for the safety and victory of the Romans. So when Capua was taken and plundered,[3] both by Senate decree and vote of the people liberty and their goods were restored to these women, and they[4] were bidden to come to Rome for the purpose of asking from the Senate whatever rewards they desired. A city richly deserving to rule, and to have held, and still to hold, the allegiance of all!

[g] [XXVI. xxiii. 8.]

43 Deserters to the enemy were liable not only to the charge and penalties above mentioned, but also to the charge of treason. So *Digest*,
44 XLVIII. iv. 2 and XLVIII. xix. 38, § 1, where it is stated that they, as well as spies (i.e. those who report on our plans), are burned alive or

[1] [*famae*, i.e. *fame*.—Tr.]
[2] [For *Bestiam Appiam, & fanculam Cluniam* read *Vestiam Oppiam, & Paculam Cluviam*.—Ed.]
[3] [For *directa* read *direpta*.—Tr.]
[4] [For *ipse* read *ipsae*.—Tr.]

hanged. Further, it is said in *Digest*, XLVIII. viii. 3, § 6 that deserters to the enemy may be killed, wherever found, as enemies of the state.

Here arises a question about which I have often heard a discussion among soldiers of rank, namely, whether[1] at the order of his general or his sovereign it is permissible for a nobleman to desert to the enemy, with the idea of spying out their situation and reporting it. Many judged this to be discreditable business for an honourable man of high standing; because both the act and the penalties are degrading; for anything is degrading which all good men so regard, inasmuch as even what is honourable [**104**] is determined either by law or by custom;[a] again, an action brings no honour if it cannot be performed without loss of dignity.[b] (Hence Tiraqueau[c] said also that custom confers and takes away nobility. Therefore, any action will be a matter of disgrace if, according to the standards of those concerned, it is so classified, as he himself here shows at great length. Hence he adds[d] that usage and common consent make an act honourable or disgraceful.)

Those upholding the other side in the argument declared that the action, as described, was not disgraceful, and that it ought not to be so classed; though the case is different with the low and base fellows who follow this pursuit as a business for pay, not, as the man in question, to assure the well-being of the state; for intent and purpose differentiate wrongs.[e] Moreover, to imperil one's self for the safety of the public and in the service of the Emperor is a great honour. So, too, the poet of old[f] lauds such action, when he says:

Joyous and splendid it is to die for one's country.

As showing that such action is not disgraceful, we may cite among the Romans the case of Sextus Tarquinius, who deserted to Gabii, pretending cruelty and hatred on the part of his father, as is recounted by Livy.[g] And among foreigners, we might mention Araspes, a very distinguished Mede in the train of Cyrus, who by the latter's orders fled to the Assyrian king, and, after spying out the enemy's resources and plans, returned to Cyrus and was complimented by him in open assembly. So Xenophon relates.[h] Lately, too, at Milan there was captured a nobleman of the French army, who, unknown and in the dress of a civilian, and lacking the regular military watchword, attempted to get possession of the citadel; and this brought him neither harm nor punishment. (And I do not see what is the difference whether you go over to capture a citadel, or to spy out the enemy's plans; and whether you are in the public eye, or[2] quite unknown.)

Another example is found in the case of those Roman soldiers who were selected from the higher ranks by Scipio and sent in the guise of slaves with his envoys to Syphax and Hasdrubal, the idea being that

[a] *Dig.* L. iv. 1, § 1; L. iv. 18, § 27.
[b] *Dig.* L. iv. 14, at the beginning; L. iv. 18, § 1.
[c] *De Nobilitate et Iure Primogenitorae.*
[d] *Ibid.* ch. xxxiv, at the beginning.
[e] *Dig.* XLVII. ii. 54, at the beginning; XLVII. x. 33.
[f] [Horace, *Odes*, III. ii. 13.]
[g] I. [liii. 4 ff.]
[h] *Cyropaedia*, VI [i. 31 ff., and iii. 14 ff.].

[1] [For *liceat ne* read *liceatne*.—Ed.]
[2] [For *an* read *aut*.—Ed.]

while the envoys were talking of peace, these men should range through the enemy's camp and observe everything. Thus finding it to be constructed of reeds and straw, by a night attack with fire Scipio won a victory over the enemy.[a] (More than once I have feared this in regard to the camp of the Emperor. For all the German soldiers build barracks for themselves in camp after this fashion.)[1]

[a] [Livy, XXX. iv.]

My own view is that the act of the above-mentioned 'deserter' was courageous and loyal, as well as very dangerous, but that it was not dishonourable. However, the rank and file of spies 'snatch their food out of the fire', as the comic poet puts it:[b] and, if detected, they pay the penalty with their lives. So, *Digest*, XLIX. xvi. 6, § 4, though this law refers to those who disclose the secrets of their own party, not those of the enemy.[2] [**104**] But the punishment of the latter, if caught, I have observed to be similar.

[b] [Terence, *Eunuch*, 491.]

48 Again, Tacitus indicates that trust reposed even in spies who serve with honest intent is a perilous and uncertain venture; for, says he,[c] through their eagerness to learn the plans of the opposing enemy they fail to keep secret their own. And, being common and low persons, there are few among them that do not work in the interest of both parties, in order to lessen the risk to themselves.

[c] [*Histories*, II. xxxiv.]

49 50 A soldier forfeits his life also, if he has stirred up a dangerous mutiny;[d] but in case it is less serious, not extending beyond shouts and complaints, he is disciplined by reduction in rank, or even by discharge from the service,[e] according to the strictness or even the compassion of the general. For this and all other military offences are punished with varying degrees of severity.

[d] *Dig.* XLIX. xvi. 3, § 19.

[e] *Ibid.*

Scipio inflicted punishment on the ringleaders of a mutiny in Spain, beating with rods and beheading thirty-five of them.[f] Far more drastic was an action of the Senate itself; for, though four thousand men were involved, it ordered that an entire legion be executed for having seized Regium after killing the leaders of that commonwealth.[g] Again, Drusus, son of Tiberius, suppressed with the greatest severity that mutiny in Pannonia of which I have previously made mention, quoting from Tacitus. For he ordered that the leaders in the mutiny, Vibulenus and Percennius, be summoned to his presence and executed, and he had their bodies buried in his own quarters. The rest of the agitators were hunted down and massacred by the centurions and soldiers.[h]

[f] [Livy, XXVIII. 26 ff.]

[g] [Livy, XXVIII. xxviii. 2 ff.]

[h] [Tacitus, *Annals*, I. xxix. 4 ff.]

Still more shocking was the punishment meted out at that period in the case of a mutiny in Germany.[i] For the men who were loyal, acting together and previously instructed by their commander, made a sudden attack with drawn swords upon the others, who were off their guard and expected no such thing, and slew them, doing no small execution.

[i] [Tacitus, *Annals*, I. xlviii.]

[1] [Compare the winter camp of Quintus Cicero, Caesar's *Gallic War*, V. xliii.—Tr.]

[2] [After *hostilium* a full stop should be marked.—Tr.]

Another section of that same army—for a sort of fateful poison had infected all—was purified of mutiny in the following fashion. As if called to assembly, the legions stood with drawn swords, and the suspects were exhibited one by one upon the tribunal. If the audience cried out 'guilty', the man was thrown down headlong and dispatched; if he was passed as innocent, he stepped down scot-free. So Tacitus.[a]

[a] [*Annals*,] I [xliv].

But in our[1] times, almost yearly we witness mutinies and all but revolts of the soldiers, even in a single garrison. Yet there never seems to be any correction or punishment. It is no wonder, therefore, that there is no discipline and no respect for commanders.

And what I said of the legion that took possession of Regium is in line with the statement of the Jurisconsult[2] in *Digest*, XLIX. xvi. 3, § 21, 51 namely that if a legion revolts, it is customary to withdraw it from the service; for it is revolt to oppose an officer or the general and not to obey his commands. However, Accursius there understands and explains far differently.

It is a serious offence also for a soldier to lose his arms in warfare, 52 and the penalty is death; so, too, if he transfers possession of them.[b] But by clemency his punishment may be loss of rank.[c]

[b] *Dig.* XLIX. xvi. 3, § 13.
[c] *Ibid.*

Further, it makes a difference what arms he has disposed of. If it be greaves or shoulder-piece, he is flogged; but if sword or [**105**] breast-plate, or shield, or helmet, he is no better than a deserter.[d] But in all these matters a new recruit is treated with less severity.[e]

[d] *Dig.* XLIX. xvi. 14, § 1.
[e] *Dig.* XLIX. xvi. 14, at end.

Again, a man who steals the arms of another is punished by loss of rank.[f] And he who in warfare does not follow the orders of his general, or goes counter to them, is punished with death, even though success attends his efforts.[g] Such was the very sad fate of the younger Torquatus, who fought with an enemy against his father's orders and was victorious, but paid the penalty with his life. From this incident 'Manlian orders' have become a precedent and a proverbial expression.[3h]

[f] *Dig.* XLIX. xvi. 3, § 14.
[g] *Dig.* XLIX. xvi. 3, § 15.

[h] [Livy, VIII. vii.]

Franciscus Cremensis cites *Digest*, XLIX. xvi. 3, § 15[i] as the sole law in support of this principle, but adds the limitation: unless some 53 unsuspected reason appears, or some existing circumstance comes to light that had been unknown to the general. He cites *Digest*, XVII. i. 30, near the end, where it is shown that, by reason of an important circumstance which develops, an order both of the law and of an individual is set aside. According to his wont, Felinus discusses this matter at length[4] on *Decretals* I. ii. 1,[j] where he makes application to many cases; so to another case on *Decretals* I. xxxiii. 9.[k]

[i] *not.* 150 (*Mandatum fuit*).
[j] col. 14.
[k] col. 3.

I fear that the above limitation is not[5] valid; and we read of an instance of contrary practice in Livy.[l] Quintus Fabius Rullianus[6] had

[l] VIII. [xxx ff.]

[1] [For *haec* read *hac*.—Tr.]
[2] [Modestinus.—Ed.]
[3] [Manlius being the family name of the Torquati.—Tr.]
[4] [For *latò* read *late*.—Tr.]
[5] [*non* has perhaps fallen out after *ne*.—Tr.]
[6] [For *Rutilianus* read *Rullianus*.—Ed.]

operated successfully against the Samnites; for he utterly defeated the enemy, and this for no other reason than because, in the absence of the Dictator Lucius Papirius, they had become rather lax and careless, and, in fact, more arrogant—which surely[1] was the development of a new circumstance. Yet the dictator summoned his master of horse,[2] Fabius, for trial before him on the ground that, in fighting with the enemy, he had engaged in battle contrary to orders; and Fabius scarcely escaped paying the penalty for breach of discipline.

On the side of Fabius, says Livy,[a] were arrayed the dignity of the Senate, the goodwill of the people, the support of the tribunes, and the thought of his absent army; opposed were the invincible authority of the Roman nation, the military code, the injunction of the dictator,
54 and the 'Manlian orders'. And a little farther along he adds:[b] '. . . when, as a result of once breaking through the discipline, the soldier no longer obeys the order of the centurion,[3] the centurion that of the tribune, the tribune that of the legion commander, the legion commander that of the consul, the master of horse that of the dictator, and when the men range about without leave in friendly or hostile territory and the scantily attended[4] standards are deserted, and, just as in brigandage, blind chance takes the place of well-ordered service.'[5] So Livy. (Would that our service to-day were not of this sort!)

[a] [VIII. xxxiv. 1 ff.]

[b] [VIII. xxxiv. 7 ff.]

At length it was reluctantly granted to Fabius that the Roman people, by recourse to entreaty, should secure pardon for him—not that he should be acquitted of the offence, but, condemned therefor, he should be excused as a favour to the Roman people.[c]

[c] [Livy, VIII. xxxv. 5.]

Moreover, *Digest*, XVII. i. 30 could apply only in a matter that was not very serious or prejudical to the welfare of the state. Further, the case against Fabius can be strengthened by appealing to Caesar, who thus writes:[d] 'Many judge that if he' (the reference is to Sulla,[6] his lieutenant) 'had chosen to follow up the enemy rather vigorously, the war could have been brought to an end on that day. [**105**] But I do not think that his course is to be criticized; for', says Caesar, 'the functions of a lieutenant and the commander-in-chief are not the same. It is the business of the one to do everything according to orders; the other should take measures freely for the general good.'

[d] *Civil War*, III [li].

55 Once more, any insubordination of a soldier against his general calls for the death penalty.[e]

[e] *Dig.* XLIX. xvi. 6, § 2.

56 Soldiers are punished, but less severely, if they fall out of the line; for in this case they are flogged or reduced[7] in rank. (To-day this business concerns the officer known as the sergeant-major, though he scarcely

[1] [Assuming the reading *utique* for *utrique*.—Tr.] [2] [*militum* an error for *equitum*.—Tr.]
[3] [For *Centuriones* read *centurionis*.—Tr.] [4] [For *in frequentia* read *infrequentia*.—Tr.]
[5] [The quotation does not form a complete sentence. It is a fragment of the argument presented by the dictator.—Tr.]
[6] [For *Silla* read *Sulla*.—Tr.] [7] [For *mutlant* read *mutant*.—Tr.

succeeds in making the men march in line, without ranging everywhere over the fields through by-ways and no-thoroughfares, looking to see whether there is anything which they can plunder and steal from the unhappy rustics belonging either to their own party or to the enemy.)

Heavy punishment was meted out[1] also to men who refused to enrol for service. Sometimes they were reduced to slavery, as being traitors to the liberty of the state.[a] Sometimes those who did not appear at roll-call were beaten and thrown into prison (so Livy),[b] and occasionally they were even killed.[2] Of the consul Valerius, Livy says:[c] 'When he had collared a few who appealed to a tribune, the rest were intimidated and took the military oath.' 57

[a] *Dig.* XLIX. xvi. 4, § 10.
[b] VII [iv. 2].
[c] IV [liii. 8].

In fact the importance attached to the levy was such that in case of emergency even those who claimed exemption from service were administered the oath, and investigation of the claim of exemption was postponed until after the war—though it was a case of prejudicial exception. Such we read in Livy[3][d] was the procedure of the Dictator Postumius.

[d] IV. [xxvi. 12.]

A soldier is executed also, if he lays violent hands upon his superior, 58[4] the crime being made more heinous by the rank of the officer.[e] In fact even if the soldier resists an officer when he is beating[5] him, he is liable to the same punishment.[f] But though resistance of any sort is a crime, still it is customary to make distinction according to its character.[g]

[e] *Dig.* XLIX. xvi. 6, § 1.
[f] *Dig.* XLIX. xvi. 13, § 4.
[g] See *Ibid.*

And, to touch on this matter in passing, a soldier is disciplined not only by his tribune or centurion, but also by the captain, who ranks below the other two. Of these captains frequent mention is made in the laws, and in particular in the reference last cited, where, however, the corrupt reading *a principe* is found. But the very force of the context discredits this; for, as I have pointed out above,[h] the *principes* ('first-line men') were a class of privates. (Hence I infer that even to-day it is permissible for an insubordinate common soldier to be corrected[6] by an inferior officer, e.g. a sergeant, or a commander of ten, who is known as a corporal.)

[h] Part I, chap. xi, no. 9.

And let it not be counted strange that I have said: 'if he resists an officer when he is beating him'; for the soldiers were beaten with clubs and also with the centurion's staff. And that was to them no more a 59 humiliation and disgrace than it would be for a lad, if the schoolmaster

[1] [For *animadnertebatur* read *animadvertebatur*.—Tr.]

[2] [Compare also the punishment suffered by a father who had the thumbs of his sons cut off that they might avoid enlistment, Suetonius, *Augustus*, XXIV. 1; and see *Digest*, XLIX. xvi. 4, § 12.—Tr.]

[3] [Livy is not exactly reported here. By comparing III. lxix. 7, it will be seen that he means to say merely that many persons who thought they had a claim to exemption were induced to enroll by the fear that, if they held aloof, their claim to exemption might be disallowed later—in which case they would be classed as deserters.—Tr.]

[4] [The sectional numbering is confused at this point. For 54 read 58; the first 59 should be disregarded.—Tr.]

[5] [For *cedenti* read *caedenti*.—Tr.]

[6] [For *coerere* read *coercere*.—Tr.]

should give him a flogging. I realize that this will appear childish and silly to the braggart soldiers of our day. Yet the military laws [**106**] so direct, though[1] the men of that age were not a whit inferior to our soldiers in self-respect and courage.[a]

Hence we read in Tacitus[b] that the nickname 'Hand Me Another' was given to a certain centurion much addicted to flogging, who, after breaking[2] his staff on a soldier's back, would call for another.

60 Moreover, a soldier owes such deference to his officer that it is his duty to expose himself to peril to shield him. And if he does not protect him when he can, he is on the same footing as the person who makes the attack.[c] Further, if the officer loses his life, the soldiers who failed to protect him are condemned to death.[d]

61 However, if the onset was too fierce to be stemmed, the soldier had a right to look out for his own safety and life;[e] and in the light of this provision we should perhaps interpret the feudal laws in their bearing on a vassal who deserts his lord in battle—(on this see the *Feudorum Libri*,[f] though the doctors thereon do not recognize this distinction explicitly)—for in cases where my aid cannot avail the lord, how would my death or my capture help matters? But a vassal should beware of seizing upon an occasion as an excuse, because, in addition to suffering the stigma of disgrace and infamy, he will besides have to face as his judge either the lord himself, or at any rate his successor; and by him he will be severely held to account.

62 From the above it follows also in like manner that the man who in battle starts a retreat is deserving of death. So *Digest*, XLIX. xvi. 6, § 3, where it is stated, further, that for the soldier mere laziness and 63 sloth are crimes. As a matter of fact, the remissness of a soldier might 64 be so flagrant and so ill-timed that the death penalty would be deserved. For suppose that a soldier, even of the rank and file, should avoid service by feigning illness—surely such a one would be on a par with a deserter. So we read in *Digest*, XLIX. xvi. 6, § 5.

I witnessed the bringing of this charge against a certain captain of the imperial party, who, when marching by night to carry aid to a garrison of his party which was being besieged by the enemy, sprained his ankle (as he claimed), and did not make his way into the post. And because at almost the very moment of the surrender of the garrison he was observed to walk without difficulty, it was believed that he had feigned illness; and there was not lacking some one to suggest to the general that the man ought to be executed. And Angelus[g] comments on the afore mentioned *Digest* XLIX. xvi. 6, § 4 to this effect, citing as an example Brunaldus of Bologna, who proceeded on this principle.

[a] *Dig.* XLIX. xvi. 3, §§ 1 and 16.

[b] [*Annals*, I. xxiii. 4.]

[c] *Dig.* XLIX. xvi. 6, § 8.

[d] *Dig.* XLIX. xvi. 3, § 22.

[e] *Dig.* XLIX. xvi. 6, § 8.

[f] II. XXIV, chap. i, § 2; I. V, chap. i; I. xxi, § 1, el. 2.[3]

[g] *On Dig.* XLVII. iv. 1, §. 14.[4]

[1] [For *cun* read *cum*.—Ed.]

[2] [For *facta* read *fracta*.—Tr.]

[3] [Correcting the false reference of the text.—Tr.]

[4] [Reading *non tantum* for *non autem*.—Tr.]

The conduct of the above captain reminds me to mention a somewhat similar incident. A certain garrison commander actually did not have a force of soldiers sufficient to hold out against the enemy; in addition, a great throng of townspeople came to him declaring that if he did not take action himself, they would themselves look out for their safety and that of the city, and that they would not suffer it to be pillaged. Constrained by these difficulties, he surrendered the city; but later this was charged against him as treachery and neglect of duty, [**106**′] and he was acquitted only at heavy expense and with great difficulty. [65]

[a] [Livy, XXIV xxxvii. 2.]

A rather similar situation developed at Henna,[a1] a city of Sicily, where Lucius Pinarius was in command with a Roman garrison; but the townspeople were in sympathy with the Carthaginians, and they therefore begged the commander that he would trust to them the keys of the gates and even the citadel, so that it might appear that they were on the side of the Romans by choice, rather than by compulsion. The commander declined, on the ground that it was a capital offence among the Romans either to surrender keys, or to withdraw from garrison duty.

As the people were insistent and prepared to use force, he[2] put the matter off until the following day. In the interim he summoned his soldiers and advised them what must be done, and what his wishes were. On the next day, when the same demands were made regarding the citadel and the keys, the commander declined on the same grounds as before; and as threats were now being brought to bear, he gave the signal to the soldiers according to previous arrangement, and the townspeople were butchered, unarmed and unprepared, by the forewarned and armed soldiery. Thus possession of the city was maintained by a deed that was either evil or necessary.

But in the case previously mentioned it would not have been very safe or wise to proceed thus; for the strength of the garrison was inferior, and the enemy was stationed[3] immediately outside the walls. Therefore, I too think that the commander deserved acquittal—which was ordered by decision of the Emperor himself.

Commanders, therefore, should be wary of capitulations of this sort, which involve peril to reputation and to life; and they should prefer death to an action that is doubtful and possibly even disgraceful. For 66
that man is open to the charge and penalty of the Julian Law on Treason who has failed[4] to hold a citadel, or who has abandoned his camp to the enemy, as is stated in *Digest*, XLVIII. iv. 3, at the beginning. But I think that this should be restricted to cases of evil intent or manifest negligence.[5]

There are also several other points in the Julian Law that bear on 67

[1] [Reading *Hennae* for *Etnę*.—Ed.]
[2] [For *ipsę* read *ipse*.—Tr.]
[3] [*starent* should be read for *staret*, or *hostes* should be singular.—Ed.]
[4] [See the text of the *Digest* reference following.—Tr.]
[5] [For *signitie* read *segnitie*.—Tr.]

our subject. For a man offends against this law if, on his own responsibility and without the Emperor's orders, he has held a levy, organized an army, or waged war.[a] (But by 'army' understand, not many soldiers, but many divisions, i.e. regiments, or companies, as they are commonly called.)[b]

68 In another version, that same law[1] reads: 'or has held a citadel'. This has reference to persons who strengthen, fortify, and hold citadels or castles without the warrant of the general and on their own responsibility, as was done in one of the late wars by the Spaniard Salcedus in the case of the citadel at Cortemiglia.

The penalty of this same law falls upon the man who does not receive his successor and turn over the province to him, as was true of Antonio de Leyva during the late wars, when the Emperor sent the Duke of Brandenburg and Brunswick[2] with a German army to succeed him. But though he did not receive the Duke, it did not work him any injury. Possibly, however, private dispatches had countermanded the order.

The same holds true also of the man who has led an army into an ambush, and who has injected new life into the enemy with supplies, arms, horses, money, or anything else. For not even to the ambassadors of the enemy is it permissible to sell arms,[c] [**107**] nor yet the materials[3] out of which arms might be manufactured.[d]

So of the man who attempts to kill an imperial official holding an independent command;[e] or who has estranged a friendly king; or who has frustrated getting control of the enemy; or who has turned friends into enemies; or who has sent to the enemy a messenger, or a letter, or has betrayed the watchword—but with evil intent[f] (whence Bartolus declared that the bearers also of treasonable letters are guilty of this crime, according to *Digest*, XLVIII. iv. 1, near the end, where Alexander[g] comments; and this was the view of Baldus[h] also); so he who has stirred up a military revolt against the Emperor;[i] and he by whose plotting and treachery a state or province has been betrayed to the enemy.[j]

The other points under this law do not in general concern our present subject, except for the case of a man by whose help or compliance the enemy have carried off plunder from friendly territory. Such a person is burned alive.[k]

69 It is also a capital offence for a soldier to enter a fortified post over the entrenchments; but if he crosses the moat only, the penalty is lighter.[l] This worked woe even for Remus,[4] founder of the city.[m]

70 Again, it was a capital offence to strike with the sword a comrade-in-arms.[n] I fancy that this rather severe enactment was made with a

[a] Same law.

[b] *Dig.* III. ii. 2, § 1.

[c] *Code*, IV. xli. 2.

[d] *Ibid.*

[e] *Dig.* XLVIII. iv. 1.

[f] *Dig.* XLVIII. iv. 1 and 4.

[g] *addit. ibid.* and *addit.* on *Dig.* XLVIII. xvi. 1, § 13.

[h] *On Code* VI. li. 1, § 9, words *extra quaero.*

[i] *Dig.* XLVIII. iv. 1, at end.

[j] *Dig.* XLVIII. iv. 10.

[k] *Code*, XII. xxxv. 9.

[l] *Dig.* XLIX. xvi. 3, § 17, 18.

[m] *Dig.* I. viii. 8, § 2.

[n] *Dig.* XLIX. xvi. 6, § 6.

[1] [i.e. *Digest*, XLVIII. iv. 3.—Tr.]

[2] [Since Belli has avoided the Latin names here, read *Braunschweig* for *Bransnich*.—Ed.]

[3] [For *materia* read *materiam*.—Tr.]

[4] [Referring to the tradition that Romulus slew Remus for leaping in derision over the (sacred) walls of the city. The incident is not mentioned in the *Digest* reference here cited.—Ed.]

view to forestalling riot among the soldiers, which easily develops when every one is rushing up to the defence of his friends. However, the penalty was milder, if the act was inspired by wine or wantonness[a] (which palliates the very frequent broils of the Germans and the Swiss—though in fact they judge of crimes according to usage and standards of their own, not according to Roman law). 71

[a] *Dig.* XLIX. xvi. 6, § 7, at the end.

Further, it is a capital offence for a slave to venture to have himself enrolled in the service.[b]

[b] *Dig.* XLIX. xvi. 11.

So also for a soldier in confinement, who has made his escape by breaking through his prison; but not if he gets away by his wit, let us say through a window or an open door,[1] nor in that case will he be classed as a deserter; for it is the prison, and not the service, that he deserts, as is stated in *Digest*, XLIX. xvi. 13, § 5. But Digest, XLVIII. xix. 38, § 11 says that if he forces his way out with a sword that has been given him, this, too, will be a capital offence. 72

[c] *Dig.* XLIX. xvi. 16, § 1.

Again, a soldier who disturbs the peace is punished with death.[c]

[d] *Dig.* XLVIII. xix. 38, § 11.

If a soldier set to guard a prison allows a soldier to escape, he is liable to the same punishment as the man who escaped.[2d] But *Digest*, XLVIII. iii. 12, more broadly and liberally makes distinction according as the prisoner escaped as the result of culpable carelessness on the part of the custodian, and according as he escaped alone, or in the company of many. 73

[107] In a soldier, unfilial conduct towards parents also is a crime—even in the matter of words, e.g. if he assails them with abuse and reviling, or calls his mother an evildoer. For in such a case he is excluded from the service.[e] 74

[e] *Dig.* XXXVII. xv. 1, § 3.

Finally, a soldier who leaves his post—even to inspect his estates—is punished severely.[f] (But in these cases above mentioned, and in all others where there is question of punishment, it is always proper to take into consideration whether a person did wrong by design[3] or by accident[g]—so that the full penalty or a lighter punishment may be imposed.) 75

[f] *Code*, XII. xxxv. 11.

[g] *Dig.* XLVIII. xix. 5, § 2.

For other crimes, the penalties are in general as follows: corporal punishment, money fine, debarment from civic functions (such, I suppose, as confer honour;[h]—but not from others, unless you would have punishment merge into a favour[i]); so also transfer to another branch of the service, loss of rating, and dishonourable discharge.[j] 76

[h] *Dig.* L. iv. 6, § 3; L. iv. 14.

[i] *Dig.* XLVIII. xxii. 7, § 22.

[j] *Dig.* XLIX. xvi. 3 (oft cited § 1.

But the further crimes of soldiers and the variety of punishments (both for the misdeeds above mentioned and for others, and specifically for individuals and in general for everybody) I find it impossible to treat; for they are subject to the discretion of the Emperor himself, and sometimes to custom—taking into account the character 77

[1] [For *hostio* read *ostio*.—Tr.]

[2] [See the *Digest* reference.—Tr.]

[3] [For *consultò ne* read *consultone*.—Tr.]

of the deed and the occasion, the rashness of the offender, the precedent, the outcome, and other details which it would be difficult to look into.

78 His entire army was punished by the consul Appius for disgraceful retreat. The standard-bearers who had lost their colours and the centurions and double-ration men who had deserted their companies he caused to be flogged and beheaded. The rest of the command was segregated by lot,[1] and every tenth man was executed—very stern measures indeed for the punishment of retreat, even though executed with deliberate purpose, as was then the case. So Livy,[a] who also records[b] that at another place cohorts which had lost their colours were left outside the camp, without tents, and all but at the mercy of the enemy.

[a] II [lix. 10 ff.].
[b] X [iv. 4.].

Most considerate of all was the procedure of Gracchus.[c] When four thousand slave volunteers had fought half-heartedly and failed to break into the enemy's camp along with the other victorious troops, in fear of punishment they occupied a hill[2] near the camp. These he summoned 79 and read them a lecture on having shirked battle and withdrawn. Then he caused them to take oath that they would not eat or drink in any other posture than standing up as long as they were in the service, unless prevented by illness. (These are the volunteers whom I have above referred to, namely the slaves purchased and inducted into the service after the battle of Cannae.)

[c] [Livy] XXIV [xv. 6 ff.].

On the other hand, in the case of those soldiers who surrendered (as I mentioned above) and did not venture to follow their comrades in a night escape, and whom it was voted not to ransom at public expense,[d] the Senate wrote in very scathing terms to the proconsul Marcellus that they were no longer to be trusted in the service of the state. If he thought otherwise, he might act accordingly, provided that no one of those men was relieved of burdens, nor[3] presented with a soldier's reward [**108**] even for valour, and that they be not brought back into Italy (whence they had been banished) so long as the enemy had a footing there.

[d] [Livy, XXV. vii. 3 ff.]

This same Marcus Marcellus took milder action in the case of the cohorts that had lost their colours when he was engaged in battle with Hannibal, ordering that barley be issued as their ration, instead of wheat. The centurions of the maniples that had lost their colours he left shorn of belt and scabbard,[4] and exacted no further punishment.[e]

[e] [Livy, XXVII. xiii. 9.]

On the other hand—an ancient performance, and uncommon in those days (to quote the words of Tacitus)—Lucius Apronius, commander in Africa against the renegade Tacfarinas, ordered death by

[1] [The impossible structure of the Latin sentence is due to synesis in the text quoted.—TR.]
[2] [For *colem* read *collem*.—TR.]
[3] [For *ne ve* read *neve*.—ED.]
[4] [The text of Livy reads: *destrictis gladiis discinctos*.—TR.]

clubbing for every tenth man selected by lot from the cohort which in battle had started a retreat.[a]

[a] [Tacitus, *Annals*, III. xxi. 1.]

And we read in Tacitus, again, that when the general Corbulo 80
desired to raise the lax morale of the legions in Germany to the old-time standard, he issued orders that no one should straggle from the column, or fight without orders, and that they should serve as pickets and in the watch[1] and in all other duties of day or night fully armed. And he punished disobedience so severely that he executed one man because he was digging earth for a rampart in undress, and another because he was armed with a dagger only, and lacked his sword. 'The soldiers realized', says Tacitus, 'that he would be inexorable with regard to serious faults, inasmuch as he was so severe in respect to the trivial.'[b]

[b] [*Annals*, XI. xviii.]

And again, when Corbulo was in Armenia, waging war against the Parthians[2] for Tiberius (or possibly for Nero[3]), he recalled to strenuous activity the Roman soldiers, among whom not even the veterans had done[4] service as pickets or on the watch, and many of them had never set eyes on a rampart or moat, but in sleek idleness[5] had run to seed in the towns, without helm[6] or corslet. In the roughest weather he kept the whole army in tents,[7] where the limbs of many were frosted by the severe cold, some died on guard duty, and there is even on record a soldier carrying a bundle of sticks, whose hands froze so hard that they fell off, leaving but stumps of arms. Meanwhile the commander himself, in light clothing and with bare[8] head, at work and on the march set an example for all. A check upon those who tried to escape these hardships by desertion was found by this commander in severity; for a man who deserted his colours at once paid the penalty with his life. 'It was demonstrated', says Tacitus, 'that such severity is much more 81
salutary than mercy; for fewer deserted from that camp than from other camps where clemency was the order of the day.'[c]

[c] [*Annals*, XIII. xxxv.

(In our times the same extreme of cold was suffered by the army of Charles, while besieging the city of Metz; and a large part of his force perished under stress of the winter weather. And what I have said of severity of discipline is reinforced by the following words of Vegetius:[d] 'The commander should maintain absolute control through severity;[9] the faults of the soldier he should punish by fixed rules; and he should have the reputation of sparing no culprit.')

[d] *Rei Militaris Instituta*, III. x.

But, to come back to Corbulo, he reprimanded all the officers and soldiers who had given way before the enemy in battle, and ordered that they find quarters outside the rampart; and after keeping them in

[1] [For *viglias* read *vigilias*.—Tr.]
[2] [For *partis* read *Parthis*.—Tr.]
[3] [This was the fact.—Tr.]
[4] [Tacitus uses the pluperfect tense.—Tr.]
[5] [*ocio*, i.e. *otio*.—Tr.]
[6] [*galleis*, i.e. *galeis*.—Tr.]
[7] [*pelibus*, i.e. *pellibus*.—Tr.]
[8] [For *in tecto* read *intecto*.—Tr.]
[9] [The citation is based on a doubtful text.—Tr.]

this state for a long time, it was only with reluctance that he pardoned them at the entreaty of the whole army.[a]

82 And Pescennius [**108**′] Niger (as related in his biography[b] by Flavius Vopiscus)[1] condemned to death ten soldiers who had stolen a barn-yard fowl; and scarcely was their pardon secured by the entire army though on the point of open mutiny. It was ordered, however, that each man should pay a fowl to the owner, and that during the whole campaign no one of them should kindle a fire or eat food freshly cooked; and spies even were appointed to keep them under surveillance.

83 Indeed the rigour of this Pescennius is said to have been so extreme that on a campaign he forbade the soldiers to drink sweet wine, and to content themselves with the sour; and he was unwilling to have bakers follow the camp, ordering the men to subsist on soldiers' bread which to-day is called biscuit. Again, when in Egypt the soldiers were complaining that they had no wine, he cried: 'Here is the Nile; and do you call for wine?'[c]

Vopiscus records,[2] further, that Avidius Cassius issued orders that on a campaign the men should carry nothing but lard, soldiers' biscuit, and sour wine.[d] And lest you suppose that these are mere fictions regarding soldiers' biscuit, it is mentioned in very many laws of the *Code*, especially in XII. xxxvii. 1 and XII. xxxviii. 2, and in numerous other places. (Would that these standards were enforced in these days! For a far smaller throng of sutlers and other useless folk would then follow the camps.)

And although I am aware that many of the penalties above described will seem trifling and foolish to generals of our time, if this work of mine (whatever its merit) should ever fall into their hands, I would yet have them bear in mind one thing, namely that all men, and 84 especially soldiers, are prone to wrongdoing, and that ready pardon is 85 an encouragement to sin and crime; and[3] in fine they should ponder that experience of Corbulo—that the soldiers under him feared[4] to commit grave wrongs, knowing him to be inflexible in regard to trifling offences.

86 Furthermore, in army life there should be the least possible wrongdoing, because there the tiniest spark may start a great conflagration.

In regard to this matter of punishments, no other more definite 87 principles can be laid down, since in the case of the Emperor all punishments are discretionary, as Baldus stated on the basis of *Code*, I. i. 1[e]; for the Emperor's judgement is based on divine inspiration, according to the statement there.[5] Hence, men who serve under the Emperors

[a] [Tacitus, *Annals*, XIII. xxxvi. 4 ff.]
[b] chap. x.
[c] [chap. vii.]
[d] Avidius Cassius, chap. v.
[e] col. 6, last oppo.

[1] [This Life is now ascribed to Spartianus.—Tr.]
[2] [The life of Avidius Cassius is now ascribed to Gallicanus.—Tr.]
[3] [For *Ad* perhaps *At* should be read.—Tr.]
[4] [For *pertinuisse* read *pertimuisse*.—Tr.]
[5] [See the *Code* reference.—Tr.]

should be wary of committing acts that call for punishment, since they cannot know of what nature this will be.

One point, however, I think should not be omitted—for it is not 88
unrelated to punishments—namely that, if a tribune, centurion, or any other officer whatsoever has inflicted loss unlawfully in company with the men of his command, he is liable for the action of all. So Baldus held;[a] and the view of Martinus Laudensis was the same.[b]

In fact, if forced to make payment, he cannot claim any reimbursement from the men of his command and his comrades-in-arms (*Digest*, II. x. 1, § 4, where Angelus comments, following Bartolus); [**109**] just as in the supposed, case the soldiers cannot bring action against him either, supposing that they suffered any loss in the enterprise in question. So Bartolus on *Code*, IX. xii. 6,[c] where he warns that this should never be forgotten.

It is also a serious matter for a soldier if he performs as an actor, or allows himself to be made a slave;—but understand this of real slavery, and not of the status of a servant.[d]

Further, it is among the punishments (as ordered in *Digest*, III. 89
ii. 2, § 2, and *Code*, XII. xxxv. 3) that a man dishonourably discharged may not live either in Rome or in any other city where the Emperor is.

Finally, a soldier is punished if he is careless of his honour; for if he makes settlement on a money basis with the seducer[1] of his own wife, he is dropped from the roll and exiled.[e]

And do not suppose that punishment is to be feared only by the common soldier; for it is in store even for the commanding general himself, if he has done any wrong. Thus, such a one is ordered to be sent back under guard with his agents into a province which he has robbed, and he is directed to make good his stealings fourfold;[f] but this is a dead letter to-day.

Likewise, an officer is punished if he misrepresents the number of 90
soldiers and embezzles the pay,[g] as I have already pointed out in a previous passage.

Some other matters concerning the crimes and failings of soldiers are treated by Paris de Puteo,[h] whom you may consult at your leisure.

[a] On *Code* VI. i. 1, col. 4, the words *sed quaero qui dicantur caporales.*

[b] *De Milite*, last qu.

[c] Last words.

[d] *Dig.* XLVIII. xix. 14.

[e] *Dig.* XLVIII. v. 12, at the beginning.

[f] *Code*, IX. xxvii. 1.

[g] *Code*, I. xxvii. 2, § 8.

[h] *De Sindicatu Omnium Officialium*, tit. *de exces. mil.*

[1] [*mecho*, i.e. *moecho*.—Tr.]

[109']

HERE BEGINS
THE NINTH PART OF THE WORK

# SOLE CHAPTER

## ON SAFE-CONDUCTS

## SYNOPSIS

1 Safe-conduct. Why so called.
2 Whose business it is to grant safe-conducts; and a general distinction.
3 The lord of a castle, a praetor, or a governor may grant safe-conducts, but within their own boundaries.
4 By whom leave of absence may be granted to a soldier.
5 The commanding general himself is forbidden under some circumstances to grant leave of absence to a soldier.
5 Not even the commander may grant leave of absence to soldiers on the frontier.
6 Soldiers beyond the number of thirty may not be absent from camp on leave.
7 A safe-conduct issued notwithstanding crime and conviction, and other dishonourable circumstances, covers undetected crime also.
8 A man who secures a safe-conduct should weigh well its terms, and take proper measures for his own safety. See also number 11,[1] at the end.
9 A safe-conduct is an unreliable security.
10 Whether a judge may issue a safe-conduct.
11 A safe-conduct kept secret does not preclude the lawful killing of a banished person, provided that such killing is allowed by statute. See also Part X, chap. ii, number 36.[2]
12 A safe-conduct granted for the purpose of hauling timber covers also survey and search for the same.
13 A safe-conduct granted to a husband and his possessions may be used by the wife travelling with the husband's possessions, even though not in his company.
14 A safe-conduct granted for a journey from Pisa to Parma includes also the territory of Pisa, supposing it to be hostile.
15 A safe-conduct granted to Peter and his partners does not guarantee against their taking legal action against one another, and prosecuting one another, in spite of it.
16 The wording of a safe-conduct should be strictly interpreted.
17 Only the Emperor grants a safe-conduct.
18 Whether the preposition 'from' (*a*, *ab*) is to be understood as including the terminus or as excluding it.
19 [**110**] A safe-conduct granted for a journey from Turin to Rome does not include the *terminus a quo*.
20 The wording is interpreted by the person issuing the safe-conduct.
21 A safe-conduct granted for going somewhere is not always regarded as given for the return journey—but with a distinction, for which see the digression here.
22 A safe-conduct for Titius and four associates includes a Jewish partner.
23 Who are called associates in the matter of safe-conducts.
24 Whether a safe-conduct lapses with its first use. Distinguish as here indicated.
25 When protection granted subject to the good pleasure of the giver lapses.
26 In case it has been forbidden to transport any kind of arms to the enemy, is it allowable to deliver sword-sheaths?
27 In regard to punishable actions, we hold to a strict interpretation of terms.
28 A penalty attached to marriage does not apply also to engagement.
29 A safe-conduct automatically includes the retinue needed by the recipient.
30 Whether a safe-conduct issued during a truce extends into the time of a war that breaks out in the interim.

[1] [For 10 read 11.—Tr.]

[2] [For 35 read 36.—Tr.]

31 Whether a judge may issue a safe-conduct to a criminal.
32 A safe-conduct does not protect one who commits a fresh offence.
33 A person who fears injury may lawfully pray a judge to compel an enemy to give a pledge that he will keep the peace.
34 To a person who fears injury a judge may give permission to be escorted by friends and associates.
35 A safe-conduct may be given to a debtor by his creditors.
36 A majority of the creditors may grant the debtor such security, though the others object.
37 'Majority' has reference to the amount owed, not to the number of creditors.[1]
38 It is for the debtor to decide whether he shall surrender his estate or enjoy a five-year respite.[2]
39 After the lapse of five years the debtor is dealt with in summary fashion—even to the point of imprisonment.
40 Surrender of one's estate is an unhappy recourse.
41 Whether a statute is valid that[3] couples disgrace with surrender of estate.
42 Whether a person surrendering his estate may change his mind, i.e. recover his goods and settle his accounts.
43 A person surrendering his estate must admit and acknowledge his debt and have sentence passed upon him.
44 If a person who has surrendered his estate comes into property, he is under obligation to pay in full—but in so far as he can, not more.
45 Maintenance should be provided from the income of estates, and not from alienation of the property.
46 How 'amount' and 'kind' are to be understood.
47 A person who suffers loss of standing with the surrender of his estate has his account thereby entirely cleared.
48 Any one at all may surrender his estate. This applies even to an association.
49 A person who is solvent may surrender his estate.
50 What classes of persons there are who enjoy the privilege of not being forced to pay except to the extent of their ability.
51 [**110′**] A person under a civic burden is liable to the extent of his ability.
52 How we should interpret the words 'reserving enough to keep him from want'.
53 If pros and cons balance, then there should be collection in full without regard for privilege, because preference is given[4] the party who is trying to escape loss.
54 According to Roman law at one time, debtors were given over to their creditors in chains[5] or bound.
55 Whether surrender of estate may be refused[6] by a debtor.
56 One who refuses surrender of estate is liable in full, and without the provision 'reserving enough to keep him from want'.
57 Surrender of estate is not allowed in the case of a person fined for crime, even though it be a question of money.
58 When surrender of estate is made, all the creditors should be notified.
59 A general safe-conduct does not cover crimes;
60 Nor debts owed to the fiscus;
61 Nor, if granted to a thief, does it protect him, in case he offends anew.
62 A man who enjoys the five-year respite[7] ought to give a pledge to pay at that future date.
63 A safe-conduct does not cover a debt secured by oath.
64 The man who grants a safe-conduct is bound to make good any loss that is inflicted upon the holder because of the grantor, or because of intent to injure the latter.

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It is customary during the progress of wars to issue documents 1
which they call safe-conducts, the name being derived from the fact

[1] [For *creditorē* read *creditorum*.—Tr.]
[2] [*inducias*, i.e. *indutias*.—Tr.]
[3] [For *quòd* probably *quo* should read.—Tr.]
[4] [For *prafertur* read *praefertur*.—Tr.]
[5] [For *nexu* read *nexi*.—Tr.]
[6] [*renunciari*, i.e. *renuntiari*.—Tr.]
[7] [*Inducias*, i.e. *Indutias*.—Tr.]

itself, namely that they protect the bearers, and usually take them to their destination and back again in safety. Therefore, this is a subject that deserves our attention.

2 First, then, I ask: Who has the right to issue such a permit? And I think that a distinction should be recognized; for these documents[1] and safe-conducts are issued either to one's own people, or to some one of the enemy; and, again, to one's own people either to visit hostile territory, or to journey through one's own country.

For use within his own boundaries, safe-conducts will be issued 3 to his own people by the officer who has local[2] jurisdiction, e.g. a provincial[3] prefect, the lord of a castle, the praetor of a city, a president or governor of a province. But these safe-conducts will not hold outside the territory of the grantor, for beyond it his orders are disregarded with impunity.[a] Nevertheless, it is superfluous to petition for what has been granted[5] by the common[6] law—except[7] in the case of a suspected person, who has been forbidden to leave the city.

[a] *Code*,[4] III. xiii. 7, with text.

4 Again, leave of absence can be granted a soldier only by a tribune, a military chief, a prefect [**111**] of the camp, or even at times only by the general himself.[b] In fact not even he at times may grant it. For if a great horde of invading barbarians threatens, or if the time of a campaign is not far distant, not even the general may grant leave; and he forfeits his life, if he does. So *Code*, XII. xlii. 1, where Placentinus says that this law was intended to apply even to the supreme army head.

[b] *Dig.* XLIX. xvi. 12.

5 And a general may not give leave either to soldiers on the frontier (i.e. those who are guarding frontiers and boundaries)[c] under pain of loss of rank.

[c] *Code*, I. xxvii. 2, §§ 8 and 9.

And even when[8] everything seems secure, generals and prefects will 6 not give leaves of absence to soldiers indiscriminately, nor to more than thirty men. For the Emperor held that when thirty men were absent, this was enough to be away from the colours.[d]

[d] *Code*, XII. xxxvii. 16, § 2.

If leave was granted to a greater number, the pay of the excess men was absorbed by the fiscus, and the officer responsible for their leave was ordered to reimburse the men out of his own funds, in addition to loss of the belt, as mentioned above.[e] (Yet everybody is aware how these regulations are superseded at the present time, and how scouted and even derided they are.) But up to the number above specified, the pay continued; and if it chanced to be delivered in the interim, it was kept, until the return of those absentees, in the custody of the officers' corps (which, as I have explained, is a military division[f]).

[e] See *Code*, XII. xxxvii. 16, §§ 3 and 7.

[f] See *Code*, XII. xxxvii. 16.

But, to come back to the beaten track, at times it is a question of giving leave to enemies to come and go at liberty; and this the com-

[1] [*displomata*, i.e. *diplomata*.—Tr.]
[2] [For *illum* perhaps *illos* should be read.—Tr.]
[3] [For *Provinciali* read *provincialis*.—Tr.]
[4] [For *ff.* read C.—Ed.]
[5] [Read *concessum* for *concessus*.—Tr.]
[6] [Reading *communi* for *crimini*.—Tr.]
[7] [Read *nisi* for *elisi*.—Tr.]
[8] [For *eum* read *cum*.—Tr.]

mander-in-chief alone can do, to judge from *Digest*, XLVIII. xix. 4, at the end. And I think the same is true when it is a question of granting safe-conducts to provincials, or to our own people, to enter hostile territory, or to the other party to enter ours—which even in time of peace and truce[1] is forbidden in *Code*, IV. lxiii. 4, where a sufficient reason is assigned, namely that people may not pry into[2] the secrets of another's realm.

(Even in the full tide of war, however, I have known commanders of garrisons to grant safe-conducts with open hand to provincials (both to their own and to others), allowing them to travel about and transport merchandise—a proceeding which put a pretty penny in the pockets of the commanders themselves. And though they were well aware that these permits were carried outside the territory committed to them, they nevertheless therein requested other commanders not to allow them to be dishonoured. And the latter were obliging—and not without good reason; for, as the proverb has it, 'hand washes hand'. And would that the commanding generals themselves had not reaped great profit from this sort of thing! For, under a 'blanket' permit in regard to which they had made a mutual agreement, they would allow traders freely to visit places held by the enemy, carrying about wares of almost any sort. And they designated officers to introduce them to the other party, these officers being scarcely more trustworthy than the very people they were introducing.)

No one, then, will give a safe-conduct to an enemy, nor to go into the enemy's country, unless it be the commander-in-chief. Thus Bartolus states, with general approval, on *Digest* II. xiv. 5 and IV. iii. 1, § 3; [111′] so Alexander also.[a]

[a] *Ibid. in addit.*

Connected with this subject there are not a few problems and doubtful points. Baldus[b] raises the following question: The Duke of 7
Milan gave a safe-conduct to a certain Nicodemus in these terms: 'We grant safe-conduct to Nicodemus to come to us from any direction and to pass across our territory, and to return in security, despite certain things done by him in the past against us and[3] to the detriment of our position and honour, and despite conviction and an order issued because of homicide, or despite other sentence of any kind pronounced for crime of any sort whatsoever.'

[b] *Consilia*, Bk. I, 490, beginning: *Ponitur quod quidam Nicodemus.*

Now this Nicodemus had committed certain thefts that had never been discovered. This circumstance does not seem to be covered in the safe-conduct. For its first provision grants protection as touching acts inimical to the standing and honour of the prince; and thefts do not appear to come under this head. And still less do they fall under the second head; for that has to do with crimes on which judgement had already been passed.

[1] [*induciarum*, i.e. *indutiarum*.—Tr.]
[2] [For *scrutentur* read *scrutentur*.—Ed.]
[3] [For *est* read *et*.—Tr.]

Baldus takes the other view; first, because crimes of any sort are an affront to the honour of a prince; and, second, because a man who is secure as regards crimes of any sort whatsoever on which judgement has been passed, ought much more to be safe as regards lighter offences for which judgement has not yet been pronounced against him.

8 However, recipients of safe-conducts should be wary, and weigh carefully the words of these documents. For it often happens that the person who slips on a syllable loses everything; and it is true that disputes frequently arise about them, with discussion as to the meaning of the terms.

Also at times there are judges who have an eye to profit, and to the claims of friendship, and even to ambition. And if they think they are pleasing a lord, they stretch the laws as the shoemakers spread 9 their leather. (No wonder, then, that it is said that a safe-conduct is a frail reliance, and that no person is obliged to accept one and trust himself to it![a]) As being treacherous and deceitful, there is on record the answer of a certain prominent man, who decided to put out of the way a rebel against himself, whom he had lured to him with large promises and assurances; for when the pledge he had given was appealed to, he replied: 'It was no easy matter even by this means to bring the fellow hither.'

[a] See *Decretals*, II. vi. 4, el. 2, and *Decretals*, II. xiii. 8, with comment.

And as the discussion has taken this turn, it will not be out of 10 place to consider also some points on giving a safe-conduct to criminals and law-breakers, or to exiles or banished persons, as we call them. So I raise the question whether a judge may issue such a permit. A gloss[b] sums up in a word, saying: 'He will neither issue one, nor honour it if issued'. Jacobus de Belviso and Jacobus of Ravenna follow this gloss;[c] but Bartolus follows Petrus Bellapertica, who said that the judge is wrong in issuing [**112**] such a permit, but nevertheless he will stand by his given word.

[b] *On Authent.* XVII, chap. vii.

[c] *Ibid.*

Others distinguish between a judge who has jurisdiction in his own right, and one who has delegated jurisdiction; for a man has freer scope in a field that is his own. So Felinus.[d]

[d] *On Decretals* II. vi. 4.

Saliceto[e] declared that, in view of *Digest*, XLVIII. xix. 4, no magistrate will grant a safe-conduct touching a crime on which judgement has already been passed.

[e] *On Code* IX. li. 10.

Nay more: on *Digest* XLVIII. i. 5[1], where, following Bartolus, he fully treats of this question, he makes the following distinctions: (1) a safe-conduct is given to an enemy with authorization of the law, and then the grantor should make it good; or (2) it is granted without authorization of the law, and then either the grantor revokes it as a punishment, and for the public good (therein doing well), or he revokes it out of caprice (therein doing ill).

[1] [The reference as given by Belli is incomplete.—Tr].

Or, says he, the safe-conduct is issued to a subject; and distinguish then as in the previous case, i.e. according as the law sanctions, or the reverse. Or it is granted to a non-subject (other than an enemy), and then either:

(1) The promise is regular both from the point of view of moral obligation and the method of making the agreement, and then it should be kept (for it is a serious matter to break one's word). And the same will be true if the promise is binding, though not regular (e.g. if a promise has really been made but there is no writing to show for it, or it has been improperly drawn up); for such promises ought to be kept. Or, on the other hand,

(2) The promise has a claim to validity, but it was a bare statement; and then by the letter of the law the grantor is not obliged to fulfil it; but the standard of the canon law is different. So Imolensis.

[a] *Ibid.*, last col. but one.

Bartolus[a] claims that if a person who is exiled for one crime is charged with another in regard to which he desires to clear himself, a judge may grant such a one a safe-conduct, and that he ought to honour it. But it is my view that the man will not thus be secured against the crime of which he comes to clear his name; and hence, if the nature of the case calls for it, he may be put to torture, or even condemned and made to pay the penalty; for there is no exception to a rule.

Again, in the references above cited, Saliceto and Imolensis say that a safe-conduct should not be given in the case of crime committed within the district; but if it is committed outside[1] (and, therefore, in a safe place), a promise made to the criminal should be kept. These in general are the words and views of the Doctors on this subject.

[b] *Consilia*, Bk. I. 423, beginning: *Quia scio*, col. 7.

But Paolo di Castro[b] says that any judge for legitimate cause may issue a safe-conduct; and that, in the case of the Emperor, his own inclination is sufficient ground;—in fact, a person who did not honour a safe-conduct issued by the Emperor would be guilty of treason. So he here claims; and this view is supported by *Digest*, XLVIII. iv. 1, with comment by Bartolus, who states also that when a safe-conduct has been granted by one who has the right to do so, it ought to be respected, even though a mistake was made in issuing it.

[c] *Consilium* 52.

Again, Joannes of Imola[c] declared that men chosen to maintain a good and quiet condition of the state have not the right to issue a safe-conduct, if it concerns a matter of private gain.

If I may venture to intrude myself into the company of so many august men, it is my view that it is the part of a careful and circumspect judge to consider well the limitations of his powers—so as not to attempt anything beyond them, and, if he has promised anything, that he may fulfil it. For it is not seemly [112′] that his promise should mislead any one.

[1] [For *eum* read *id.*—Tr.]

Moreover, the applicants should also take care whom they trust; and, since a very important interest of theirs is in question, they should scrutinize diligently both the wording of the document and the powers of the grantor, so that there be no regret when it is too late.

11 It was stated by Nellus[a] and Paolo di Castro[b] (as reported and followed in each case by Gozadinus[c]) that if a banished person secured a safe-conduct that was not made public, and it was permissible in conformity with the statutes to kill a banished person, the slaying of such a one would not bring the slayer within the scope of the Cornelian Law, and that he will be exonerated.

[a] *De Bannitis*, Part 2 of the second period (?), qu. 15.

[b] *Consilia*, Bk. I, 199, beginning: *Licet ista sit quaestio.*

[c] *Consilium* 61, no. 10.

There arise not a few doubtful points regarding military safe-conducts also, for example, in the following case described by Joannes
12 of Imola:[d] A safe-conduct was issued by some military commander to a certain Joannes Magnus to take four horses, two wagons, with two drivers and four servants, to get wood, hay,[1] and stubble in the territory of Imola. Some servants and drivers of this Joannes were found in the district mentioned, along with many other supernumerary persons, with only one horse, and without any wagon; and all were taken into custody.

[d] *Consilium* 33, beginning: *In casu praemisso.*

Joannes of Imola held that servants and drivers were protected and covered by the pledge given, although many other people were in their company, and although they were not engaged in hauling wood and the other things allowed. For they claimed that they had gone to find out where these were to be had. Consequently, if the right of transportation is granted to a person, so also are its necessary preliminaries, i.e. the right of search and investigation.

13 Baldus[e] stated also that a safe-conduct was granted to a certain Marcus to journey to the city of Asti with ten horses, with arms, goods, equipment, and retainers; and that it was permissible for the said Marcus to send his wife in place of himself, and that in this case the arms, horses, and other things above named[2] were just as much protected as if he himself had gone. And since the main discussion was with reference to the things, and not to the person of the wife, and since the things at any rate were specifically covered by the document, this case was simpler.

[e] *Consilia*, Bk. V. 414, beginning: *Concessus fuit salvusconductus.*

(But the same thing could be said, too, of the person of the wife, in view of the oneness existing between those who are married, inasmuch as they are one flesh. There would be more room for doubt, if the woman were also a rebel and an enemy. But this case I do not pursue further.)

14 Angelus[f] discusses the following question: At a time of war between the people of Lucca and Pisa, the former issued a safe-conduct to Christopher of Parma, who was in the service of Pisa, to travel

[f] *Consilium* 363, beginning: *Quid dolo malo.*

[1] [*fenum*, i.e. *faenum*.—Tr.]

[2] [For *supranominate* read *supra nominatae*.—Tr.]

without molestation from Pisa to Parma through the territory of Lucca, taking six horses and as many horsemen with their arms and the like. But soldiers from Lucca, on a raid through the territory of Pisa, intercepted this Christopher on his way to Parma with the above-mentioned safe-conduct, and made him a prisoner.

[113] Angelus held that the man was wrongfully arrested; for, says he, ambassadors of the enemy are just as secure while they are yet within the lines of those who dismiss them as when they have already reached the enemy—citing *Digest*, L. vii. 18, though it is not so stated in that law: again, because, when something is allowed, we take for granted permission also for a preliminary that is essential to it, and without which the privilege would be nugatory; thus where the drawing[1] of water or the right of burial has been granted, we assume that the right to travel for either purpose is allowed also. And, in that case cited by Angelus, the actual wording of the safe-conduct allowed some latitude: 'to withdraw from Pisa and to go into Lombardy'—which is a clear expression.

The commune of Ancona granted a safe-conduct to Berengarius of Barcelona, for himself and for the property belonging to him and his partners, in such comprehensive terms that he was protected even from his creditors. At Ancona[2] there was a consul who administered justice for the people of Aragon by order of the King of Aragon, and with the consent of the people and commune of Ancona.

This consul attached the goods of the above-mentioned Berengarius on the demand of a Spanish partner of his. Paolo di Castro claims that this was within the law, inasmuch as the afore-mentioned consul was a proper judge with reference to the nature of the initial situation, the nature of the matter then at issue, and also of the nature of the contract. It was said, too, that the goods taken from the man were not properly his own; for a safe-conduct does not cover such goods in a man's possession as are shown to belong to another. And, again, a safe-conduct will not avail such a holder if, between him and the partners thereby protected, a dispute regarding the goods in question should arise. This is the verdict of Paolo di Castro[a] on all these points.

Very like the case on which Angelus[b] rendered his decision is one that came up for discussion not many months ago. For the most illustrious Juan de Figueroa, commander-in-chief under the Most Serene and Excellent King Philip of Spain, granted a safe-conduct to the Marquis of Masserana to go from his castle at Candelo to Venice. It happened that, during the term of the safe-conduct, the above-mentioned general with his army invaded the lands of the marquis in question, who was of the French party. The marquis himself was taken prisoner, and he arranged for a heavy ransom, which he paid in part, giving bondsmen for another part. For the remainder he

[a] *Consilia*, Bk. I, 203 (*Viso quodam salvoconductu*), last two cols.

[b] *Consilium* 363.

[1] [*austu*, i.e. *haustu*.—Tr.]

[2] [For *Anccona* read *Ancona*.—Ed.]

was trusted, being obliged to take oath that he would pay at a time agreed upon.

But when the day for payment had passed and he was brought to trial, he defended himself on the ground that he had not been lawfully captured, and that he was not bound to make the payment agreed upon; in fact, as he argued, he might even enter a claim for the restoration of what he had already paid. His main points were somewhat as follows:

(1) At the time he was taken he was making preparations for his journey, and, for that reason, he should have been regarded as already on the way.[a] [113′]

(2) If that which was greater was allowed him (i.e. to pass through hostile territory), much more had he the right to do that which was less (namely, to remain in safety in his castle until he had made his preparations).

(3) That a broad interpretation should be allowed. (So Decio[b] said in discussing this matter, citing Baldus.[c])

(4) A plea was entered that it was as unfair to keep him at his home so that he could not set out, as to stop him after he had already begun his journey.[d]

(5) Finally, it was claimed that it was unseemly to boggle about the words and the permit of the Emperor. (This was said also by Decio,[e] citing *Code*, II. xliv. 1.)

Being one of the arbiters and judges in this case, the justice of the
16 prisoner's plea seemed to me[2] very doubtful, and, in the first place, because I did not feel sure that this safe-conduct was to be interpreted broadly. In fact, just the reverse of this, it appeared that it ought to be understood strictly and exactly, so as not to be stretched beyond the natural meaning of the words.

For this was a safe-conduct contrary to law; first, because it was issued to an enemy; and, second, because not issued by one having
17 supreme power. For only the Emperor has the right to grant leave of absence or permission to return;[f3] and the prerogatives of the Emperor are strictly and carefully differentiated from others. See *Digest*, I. iv. 3, where every one comments; Felinus discusses the point at length on *Decretals* I. iii. 18.

And though under this head Baldus[g] states that the intent of the grantor is assumed to have been an intent in the mind of a wise and good man, surely it is not likely that any one who is wise will believe that it was the intent of the grantor that his enemy should enjoy the blessing of security while lingering in the enemy's country, where he could help the latter with advice, supplies, and all his resources.

[a] *Dig.* L. vii. 6; *Dig.* IV. vi. 35, § 8, gloss on the word *agere*; and Bartolus on *Dig.* XXIX. i. 43.

[b] *Consilium* 51, col. 2.

[c] *Consilia*, Bk. I, 490.

[d] *Dig.* II. vii. 4,[1] at the middle.

[e] *Consilium* 51.

[f] *Dig.* XLVIII. xix. 4.

[g] *Consilium* 414, above cited.

[1] [For *nec eximendi l.* read *d. l. eximendi*.—Tr.]

[2] [*Michi*, i.e. *Mihi*.—Tr.]

[3] [The text of the *Digest*, however, has to do with exiles.—Tr.]

And this view is confirmed by the words of Baldus in his *Consilia*, Bk. I, 457,[a] and he repeats in an incomplete chapter in *Consilia*, Bk. V. 412,[b] where he says that, to avoid falling into absurdity, the monosyllable 'from' (*a*, *ab*) is understood in the exclusive sense, as was stated by Bartolus[c] also. (As a matter of fact, probably neither the recipient nor the grantor anticipated the event, but the recipient asked merely that he might make his journey in safety, with no reference to remaining in security at home; see Bartolus.[d]) 18

Again, the same judgement must be rendered regarding the *terminus a quo* as regarding the *terminus ad quem*; for there is no reason why the safe-conduct should have extended any more into one terminus than[1] into the other. Now a person should not receive a safe-conduct to a point within the *terminus ad quem*; therefore, not in the other either. 19

[114] Furthermore, the words stipulate security while things are in motion and in the act of transit; therefore they should not be stretched to cover inactivity. This is supported by a passage in *Digest*, XLIII. xix. 3, § 13, near the middle, where it is stated that, under the interdict there referred to, one may claim the right to travel a road, but that at times the right of repairing it cannot be maintained.

Again, when the phrasing is doubtful, we depend upon interpretation, either antecedent or subsequent.[e] Here we have the subsequent declaration of the grantor himself, who affirmed that the man was lawfully captured. Moreover, it is certain that interpretation of the terms[2] belongs particularly to the grantor.[f] 20

Still again, the man promised under oath to pay; the time passed by; and an oath is strictly[3] binding. It was his duty, therefore, to pay, and later to demand restitution, according to the comment on *Decretals* II. xxiv. 21, el. 1.

It seemed possible to rebut citations in support of[4] the opposite view—and, first, *Digest*, L. vii. 6 and 18; for there a different rule applies, inasmuch as the subject-matter in that case is favourable, but here the reverse; and the law there is excessive in detail and specification. Furthermore, those provisions have to do with time, and we are dealing with place.

Moreover, in regard to the case on which Angelus advised—advice which was cited in behalf of the marquis as being a case in point,[5] the answer was made that the soldiers in question were already in the act of transit, and the wording of the safe-conduct was clear. For it read: 'to go from Pisa as far as Parma', and the men were taken in the act of travelling.

The matter, however, was not brought to a decision because Don Juan de Guevara to whom the ransom was owed, did not press the suit.

[a] Beginning: *Reverend. pater.*
[b] (*F. locavit T.*)
[c] *On Dig.* XXXII. i. 35, § 1, col. 2, the words *Item quandoque.*
[d] *Ibid.*, the words *Item ex verisimilitudine.*
[e] Baldus, *Consilium* 457 (above cited): the words *Dicendum est ergo quod aut constat ex verbis*, &c.
[f] *Dig.* V. i. 6.

[1] [For *unùmque* read *unum quam.*—Tr.]
[2] [For *verè borum* read *verborum.*—Tr.]
[3] [*præcissè*, i.e. *praecise.*—Tr.]
[4] [For *contrarium* read *in contrarium.*—Tr.]
[5] [Interpreting *inter.* as *in ter*(*minis*).—Tr.]

It is left for the reader to decide which of the parties has the better case.[1] For I speak to inspire discussion, and I affirm nothing, as no decision has up to this time been announced.

21 In discussing this subject, the Doctors say that a safe-conduct issued for the outward journey is regarded as having been given also for the return; so Bartolus and Angelus.[a] According to them, the reason is that a person will not be said to have gone in safety, if he is not allowed to return in like manner. On this principle Panormitanus[b] declared that the period of going, stopping, and returning, are rated as in the same category; and that he who wills a result, wills also its necessary preliminary.

Geminianus[c] took the other view; and he seems to be supported by a passage in *Code*, XI. ii. 1, where people are ordered to be immune going *and* coming. This consideration is there touched on by Bartolus; and see Alexander,[d] who says that protection granted to those coming to the mart at Lyons[2] is not reckoned as extended to their return from there.

My view is that different decisions could be rendered on the basis of the facts concerned and the intent of the grantor. For suppose that an army-chief should issue to an enemy a safe-conduct to come within his lines [**114′**] and to remain there for three days; will the enemy not be allowed at the end of the three days to depart in safety? Whereas, if he gives a person a safe-conduct to journey to Rome or into France, the action is consummated in the bare fact of travel, and nothing extraneous is included; hence the words will be strictly interpreted. This was the verdict of Felinus[e] in a very similar case. And there is support in a passage in I. iii. 11, § 8 in *Sext*, where again Geminianus comments to the effect that there would have been no point there in the mention of return, if the law had been meant to be so understood; however, de Franchis there takes the other view.

But if the factors involved are doubtful (so that we are not certain whether return also is included), since we are dealing with an unfavourable subject-matter, perhaps it will not be unreasonable, in regard to privileges that ought to be carefully and strictly interpreted, to decide against the man who finds himself in difficulty as a result of careless phrasing. Cf. *Digest*, XVIII. i. 21, and II. xiv. 39; and such was the decision of Alexander.[f] Remember, however, that the Doctors generally seem to hold without any qualification that a safe-conduct given for the outward journey is good also for the return. And it is not easy to cross over from the highway to a by-path.

22 Further, it is customary to raise the question whether a safe-conduct issued to Titius with ten associates includes also a Jew

[a] *On Dig.* XLVII. xii. 5; and Bartolus and others on *Code*, XI. ii. 1.

[b] *On Decretals* III. viii. 5, no. 6.

[c] *On Decretals* I. xxxiv. 9, and *Decretum* I. xlv. 9.

[d] *Consilia*, Bk. II. 46, beginning: *Ponderatis verbis.*

[e] *On Decretals* I. xxxiv. 9, col. 3, the words *crederem dictum Cald.*

[f] *Consilia*, Bk. IV, 2, no. 6; and 106, no. 6; Bk. V, 128, near the end.

[1] [For *iustitia* read *iustitiam*; or perhaps the whole phrase should be emended to read: *utri partium iustitia faveat.*—Tr.]

[2] [If *Lugi* is for *Lug*[*dun*]*i.*—Tr.]

found among them. Bartolus[a] answered in the affirmative, and the Doctors generally follow, as Angelus;[b] and Decio[c] repeats. But, according to him, it will not protect a heretic or Saracen, or any one belonging to the enemy.[d] However, his remark about an enemy I think subject to this limitation: unless the recipient himself be a man belonging to the enemy; for in that case extension to the persons associated is easier.

[a] *On Dig.* XLVIII. iv. 1.
[b] *On Dig.* XLVII. xii. 5.
[c] *Consilium* 51, above cited.
[d] *Ibid.*

Angelus[e] says also that when a safe-conduct is issued to Titius and 23
his associates, such persons should[1] travel with a definite common purpose, and not casually and incidentally; for they will not be recognized as 'associates', if they have banded themselves together, each with a view to his own private enterprises. And for this reason he warns against going separately to different houses of entertainment.

[e] *On Dig.* XLVIII. iv. 1.

But this seems to me to complicate the subject unduly, and to offer a wide opening for soldiers to make game of these safe-conducts. Hence I hold it sufficient that the men all travel together with a definite purpose, and that no one of them be open to criticism—as was said above of a heretic, an enemy, and such others (e.g. an exile), who in the intent of the grantor are probably not included in a general permit.

The Doctors raise also the question whether a safe-conduct is 24
valid only for initial use, or whether it allows of repetition. And in general they hold that it is good only for initial use, but, however, with a distinction: (1) A definite request precedes, and the safe-conduct follows; and then it depends [**115**] upon the request whether the safe-conduct was definite or indefinite; (2) The request was indefinite, and the safe-conduct definite; and then we adhere to the specific provisions. But if both are indefinite, the safe-conduct is good only for initial use, as I have said. So Bartolus,[f] following Oldradus, whom he cites.

[f] *On Dig.* XLVIII. iv. 1.

And this seems more reasonable than what Panormitanus said on *Decretals* I. xxxiv. 9 (where he is followed by Felinus), namely that when there is a period of time specified, use is permissible at any point within that limit, and even repeatedly. For it ought to be taken for granted that it is the intent of the grantor that the act take place but once. And since the phrasing allows this interpretation, even though it would allow of another, in case of doubt the verdict will be against the man who gets into difficulty as the result of loose phrasing,[2] especially if it deals with specifically unfavourable subject-matter, according to my remarks above.

There is exception, however, if the circumstances of the case look to another decision. For suppose that a safe-conduct was granted to peace delegates to meet in a specified place during the course of a month; or suppose that, as in the case cited by Imolensis,[3] a safe-conduct

[1] [Omit *quòd* before *debent*.—Tr.]
[2] [Here, the careless applicant.—Tr.]
[3] [For *Imò* read *Imo.* i.e. *Imolensis*.—Tr.]

was granted to haul wood or some other commodity into the city during the course of a month. I should suppose under these circumstances that repeated action is permissible.

In view, however, of the fact that these disputes are often perilous, and, while the argument is going on, the holder of the safe-conduct is[1] in the hands of the enemy and barbarians, it is the wiser plan to do business on a safe basis, and not to plunge one's self into danger, but to see to it that the terms are fully clear and plain. And those who accept safe-conducts may rest assured that they never will secure them too clearly and plainly worded. (And that, in case of doubt, a safe-conduct is valid only for initial use is the conclusion reached by Alexander[a] on the basis of many similar situations.)

[a] *Consilia*, Bk. IV, 16, beginning: *Breviter in casu praemisso.*

Moreover, the exact force of the wording is insisted upon so drastically that, if a safe-conduct is issued to a fortress-commander who has surrendered his post, allowing him to depart in safety with his associates and his goods, this does not cover the goods of his associates. Such was the decision which Florianus[b] said that he rendered to the Duke of Carmagnola in view of that possessive adjective 'his', which indicates ownership. (To digress, Carmagnola was a distinguished military leader and at one time commander of the Venetian[2] army at the period when the Sforza family and the Piccinini were very prominent in Italy, his birth-place being Carmagnola in the Piedmont district. The Venetians, however, finally ordered his decapitation.)

[b] *On Dig.* VIII. v. 4, at the beginning.

And although Decio[c] appears to have rendered an opposite verdict, be assured, however, that there is no conflict. For in the case considered by Decio the words were capable of including also the goods of the associates; so there should be no cavil regarding the wording.

[c] *Consilium* 51, above cited.

25 Next I raise the question: If a general issues a safe-conduct to last during his good pleasure, supposing him to be removed by death or perhaps succeeded, [115′] would the safe-conduct hold over into the time of his successor? The Canonists[d] and Bartolus[e] consider this problem; and it is the common verdict of the Doctors that it makes no difference whether the grantor dies or finishes his term, on the ground that in either case a concession 'during good pleasure' lapses—for since the reading is 'as long as I will',[3] a person who is dead no longer wills, nor yet a person who is no longer in office (for it is his to will, who is able also to forbid, and vice versa)[f]—unless the phraseology involves the office or position. So Jason;[g] but de Franchis[h] is in doubt on this point.

[d] *On Sext*, I. iii. 5.
[e] *On Dig.* XLV. i. 46, § 2 ff.
[f] *Dig.* L. xvii. 3.
[g] *On Dig.* XLV. i. 46, § 2 ff., no. 13.
[h] *On Sext*, I. iii. 5.

However, restrict all this to cases where, as I have said, the reading is 'during my good pleasure'. But if other wording is used, this must be carefully examined; and it may be laid down as a general rule that when the safe-conduct is revokable only by a change of will, then a

[1] [For *est* read *sit*.—Tr.]
[2] [For *Venetum* read *Venetorum*.—Tr.]
[3] [For *involuntatem* read *in voluntatem*.—Tr.]

person who dies is not said to change that which he wills, but to cease to will, and for that reason the permit is not revoked. On the other hand, the permit may require a continuance of will, and then it lapses at death. To this, I think, we may reduce all the remarks of the Doctors on *Digest*, XLV. i. 46 and on *Sext*, I. iii. 5. Any one wishing further information should consult Jason,[a] who devotes three columns to the subject; and something is added by Baldus.[b]

[a] *On Dig.* XLV. i. 46, § 2.
[b] *On Code* II. vi. 1.

Under this head there came to my attention another problem 26
which I do not mean to pass over in silence. Some generals had agreed that certain commodities might be transported back and forth despite a war; but arms of all sorts were banned. It happened that a certain merchant on the imperial side carried among the goods allowed some fifty or a hundred scabbards to accommodate swords. It was claimed that here was a breach of agreement, and, therefore, that the scabbards were liable to confiscation, on the ground that when an original article is ruled out, its appurtenance also seems ruled out.

Compare *Digest*, II. xiv. 32, XLVI. i. 46, and II. i. 2, with its subject-matter, where it is stated that when one thing is forbidden, that too is forbidden without which the first is impossible;[c] and this applies with special force when the same principle is operative in both. (Here is the explanation of *Digest*, XXIII. ii. 38, which seems in conflict with *Digest*, XXIII. i. 16; for the latter, after forbidding matrimony, puts the ban on betrothals also, and the reverse ruling is made in *Digest*, XXIII. ii. 38. All the writers comment on *Code*, V. ii. 1.)

[c] See the passage in *Dig.* XXIII. i. 16, with comment on *Decretals* I. xxix. 5.

Again, there is no other reason for prohibiting the transporting of arms to the enemy than not to equip the latter for warlike activity; and this reason applies also to scabbards, without which swords are not transported. Looking in the same direction is the rule for things associated, regarding which a like verdict is expressed in *Decretals*, I. ii. 3 and II. i. 3, and in *Digest*, VI. i. 43; and there is support in *Digest*, XXXIV. i. 6, where it is stated that in case means of sustenance are bequeathed, clothing is included. On this basis, in the present instance scabbards are included, [**116**] being the covering of swords.

But the weight of evidence seemed on the other side. For in regard 27
to matters undesirable and punishable, we hold to the exact sense of the words. Hence Baldus[d] stated that a statute which punishes a person committing a crime in the street does not apply to one who offends in a mansion adjacent thereto, and a statute that punishes a person who smites on the face does not apply to a person who strikes even a heavier blow on an adjacent part. This Jason elaborates on *Digest* II. i. 2, last col., where on that ground he infers, in the case of *Digest*, XXIII. 28
i. 16, that if a penalty has been put upon marriage, it will not include betrothals also; for though with the prohibition of the one, the other, too, is forbidden, still the punishment does not apply in like

[d] *On Code* VIII. i. 1.

manner to the second. This could be developed at greater length; but it does not suit my present purpose to introduce here the question of extension of applicability, which has very recently been discussed at length by Aymo Cravetta.[a]

And a scabbard is not a necessary appurtenance or adjunct of a sword—which is an essential condition, if the same rule is to apply to both.[b] For we cannot suppose that scabbards and sword-belts were devised immediately upon the discovery of the use of the sword—just as, upon the discovery of the use of the horse, the saddle and other trappings for this purpose were not at once devised;—rather, experience and lapse of time account for much.

Furthermore, though in regard to subject-matter that is favourable, the same rule applies to appurtenances as to the original article, in matters punishable the reverse is true, in view of the rule: 'Restrict the unpleasant', &c., which, on *Digest* II. i. 2, Jason applies to three important problems.

Again, cloth, wool, and linen are not less necessary covering for the soldiers than scabbards for swords; yet these were not put under the ban—even boots and the like.

And that in respect to unfavourable subject-matter the term 'sustenance' does not include clothing is stated in *Digest*, II. xv. 8, § 12.

But whatever the merits of the case, that trader was made to suffer; for he lost all his wares (which he ransomed for six hundred crowns) on the principle that the lawful, on account of the unlawful, escheats to the fiscus. (On this last point, however, Bartolus should be consulted.[c])

Those, therefore, who secure these safe-conducts and trust to them, will do well to look out for themselves. For soldiers, too, understand the art of weighing the words in the balances; and the justice of the camp is often administered without reference to books, and frequently with little circumspection.

29 Another point to be noted under this head was mentioned by Angelus,[d] namely that when a safe-conduct is granted, it includes such suite as is essential; and this is manifestly reasonable. For if a safe-conduct is issued to a noble, he ought not to travel on foot, nor alone; but he will take with him his regular attendants. However, it is the safer plan to secure this privilege more specifically.

30 I append another question which arose in actual practice. In the year 1551, while there was peace between the Emperor and the King of France, [**116**′] a certain Germanicus Savorgnanus, a distinguished soldier of the king, secured from Don Francesco d'Este, representative of Ferrante di Gonzaga, imperial duke and vicegerent, and prefect of the fortress at Asti and of the whole Piedmont frontier, a passport and safe-conduct (as it is called), to visit the springs of Acqui in Liguria, because of his health.

[a] *De Antiquitatibus Temporum.*

[b] *Dig.* XII. vi. 67, § 4; and Felinus at length on *Decretals* I. iii. 27, col. 12 and ff.

[c] *On Dig.* XXXIX. iv. 11, § 2; and *On Code* IV. xxxiii. 3.

[d] *On Dig.* V. ii. 8, § 6.

Scarcely had he arrived there when the French attacked two of the Emperor's posts, and war suddenly broke out. Losing confidence, therefore,[1] in his passport, Germanicus started back to his friends, and was arrested at Asti by the above-mentioned prefect. The question was: could he lawfully be detained? And it seemed that he could for various reasons:

(1) Every permit and arrangement is understood with the proviso that there be no change in the situation. But here there followed a very severe upheaval and disturbance of affairs, and that, too, by the act and through the fault of the enemy, who had no claim to the use and benefit of a particular agreement and pledge, after doing violence to the public agreement; and

(2) The man himself shared in the fault no less than the others. For species and individuals are a part of their class; and he was on the way to aid those of whose action he thereby indicated his approval.

(3) It was greatly to the Emperor's interest to hold the man, inasmuch as he had seen and examined Asti thoroughly, and, in the carelessness engendered by peace, had at his leisure noted the defects of the camps and fortifications, being a man skilled in the intrenchment of forts, and one who made this his[2] chief business.

(4) The case was strengthened by a previous happening, namely that a certain French commander, by sharp practice and almost by open violence, had arrested a man of the imperial party before war had yet broken out, claiming that thus an account was being balanced. And on that ground his act was less justified because committed while peace still prevailed; for if, on account of an injury done to a subject, one may have recourse to reprisals, as they are called (namely, to a sort of warfare), provided that a warning precedes, how much more is this allowable because of a flagrant injury, and in a time of declared and open warfare?

I rehearsed all these arguments, and perhaps others, to the two Dukes, Ferrante[3] and Francesco, who asked my opinion on this point. I added, however, that the pledge of the Emperor looked strongly to the other course, and that it ought not to be obscured and evaded by argument and sophistries; also that it was not seemly that he sanction this arrest after a pledge was given, and in view of the fact that he is the arbiter of detention and release. For the prisoner, who had not relied upon peace and the public agreement, but had sought out a more definite and trustworthy protection, ought not to be disappointed.

This single argument carried the day (such is the conscientiousness and honour of good men), and Germanicus was allowed to depart—somewhat later,[4] however, both because of the weakness of the forts

[1] [For *igirur* read *igitur*.—Tr.]
[2] [For *sno* read *suo*.—Ed.]
[3] [*Ferdinando* here.—Ed.]
[4] [For *servius* read *serius*.—Tr.]

and garrison at Asti and for another more private reason which it is not now important to communicate.

31 Some other points touching the matter of safe-conducts[1] are treated by Angelus of Arezzo[a] (followed by Augustinus[b]), who lists many indulgences. He, too, specifies when a judge may grant a safe-conduct to a banished person or a criminal, and when he should honour one that has been issued. And [117] among other things he states that if a crime be such that the offender may be excommunicated, his safe-conduct can be disregarded. Again, he makes the distinction: (1) a safe-conduct was given for good reason and after investigation of the case, and then it will be honoured; (2) it was given offhand, and then the reverse.

[a] *In Maleficiorum Materia*, in gloss *quod fama pub.*, qu. 5.
[b] *Ibid.*

32 He says there also that if the holder commits a fresh crime, his safe-conduct[2] may be disregarded with impunity, citing a gloss on *Decretum*, II. xxiii. 1. 3—which, to my mind, does not show this, but merely that if there is fear that a prisoner will disturb the peace, he ought not to be spared, and may be condemned to death. However, I think that the remark of Angelus is true; for the man who offends against the law has no claim upon its benefits.

Bartolus also treats this subject of safe-conducts on *Digest* I.
33 xviii. 6, § 2, and with reference to the security which is given to a person against a person—which is specially our theme—e.g. when a man is apprehensive that his personal enemy will injure him. And he states that for good reason the man may petition for a pledge and assurance from such an enemy that he will not be injured by him; and this will be given not only by the enemy himself but also by his household and associates—and even in favour of the household of the petitioner. Bartolus declares also that the pledge given will hold even in a different territory; so that if you have given me security at Asti and injure me in Milan, the penalty is incurred and the pledge is declared violated, so that even at Milan action may be begun to enforce the penalty agreed upon (for if you were to understand Bartolus to mean that action can be begun to enforce the regular penalty for the crime and wrong there committed, how would there be room for question? For a person always falls under the jurisdiction of the court where he committed the
34 crime).[c] Likewise he declares that if it seems best to the judge to grant permission to the person who fears violence to take along friends and members of his household to protect him (but at his own expense), this will be allowed. So Bartolus.[d]

[c] See comment on *Authentica* following *Code*, III. xv. 2 (*Qua in provincia*).
[d] *On Dig.* I. viii. 8.

The effect of the assurance secured from such an enemy is that the latter is punished more severely, if he disregards it, than if it had not been secured. This seems beyond question; for the man commits a graver wrong who injures a person who is under the protection of a

[1] [For *salusconductus* read *salvusconductus*.—Ed.] [2] [For *secutitas* read *securitas*.—Ed.]

judge's warrant and safe-conduct, than one who offends otherwise, and not under these circumstances. So Bartolus.[a] My view is that it amounts to betrayal, and that it deserves the severest punishment.

[a] *Ibid.*

In addition to the safe-conduct that is issued to public enemies, and a second which is granted to criminals, there is also a third variety which is given to debtors, to protect them from their creditors. On this I subjoin a few remarks.

This protection the creditors themselves can grant, as is stated in 35
*Code*, VII. lxxi. 8. And if there is not agreement among them, the 36
decision will rest with the majority, regard being had for the amounts 37
owed. For if a thousand and ten crowns are owed to one creditor, and five hundred in all are due to others, the first mentioned creditor will in himself constitute a majority; for[1] it is fact and not person that is considered. Thus it is ordered in *Code*, VII. lxxi. 8.

And a respite of five years is granted with the proviso (according to some) that it is within the option of the creditors to declare: 'we desire to sell the property forthwith and immediately, without [**117**′] waiting five years', and that a creditor will get no hearing who desires against their wish to enjoy the reprieve. So Albericus on *Code* VII. lxxi. 8, and this is shown in the text there ('and the option be given to the creditors', &c.).

Hence it is surprising that Albericus there states that if a debtor wishes to make surrender of his estate at once, he should be given a hearing, and that the choice will be his. For this does not accord with the words cited from the above text, unless one is to suppose 38
that the words referred to are words of the debtor reported by the Emperor, the man begging that he be allowed recourse to the sad expedient of surrendering his estate, 'the option having been given his creditors', &c.; for it would be eminently unfair, if the creditors 39
chose to grant the respite of five years, that at the end of that period the man should be condemned to prison without any prospect of relief through surrender of his estate—which Baldus there said was the proper procedure, if he himself preferred to make the surrender at once. Hence our view is the better.

Again, on *Code* VII. lxxi. 8, Baldus stated that those bankrupts and business failures (of whom to-day we have a generous supply), who go through bankruptcy proceedings, not as the result of ill fortune, but with deceit and intent to defraud their creditors, ought to be rounded up and delivered over to the tender mercies of these creditors.[2] But instead of this, they protect themselves; for, taking time by the forelock, they select a safe place of refuge and secure broad immunities from rulers, who (if it were permissible) I should say commit a wrong

[1] [For *postque* read *postquam*.—Tr.]
[2] [For *tradi dilaniandoribus* read *tradi dilaniandi creditoribus*.—Tr.]

in granting concessions so promiscuously; and[1] they would do better either not to grant such protection or to cancel it if given, first warning the holder to look out for himself. Far fewer then would be guilty of such wrong, and the public weal would be much advanced.

40 Once more, Baldus[a] stated that this expedient of surrender of estate is a very wretched recourse; for a man scarcely retains his rags, and, besides, in many places there are statutes which degrade him, e.g. forcing one who surrenders his estate to strike the rock with his buttocks.[b]

41 This particular statute he said is not valid, citing *Code*, XII. xxxv. 12. Better support seems to be found in *Code*, VII. lxxi. 8: 'without loss to their reputation'—words which a gloss explains: 'that the man is not disgraced'. For who would say that there was no loss to the reputation of a person forced to such procedure? There is support also in *Digest*, XLII. iii. 9, where it is stated that it is possible to surrender one's estate by messenger[2] or by letter.

The opposite practice, however, is implied in the comments of Alciati;[c] and there are reasonable enactments which he there cites,[d] ordering that those who are ruined by misfortune, and not by extravagance, shall not be thus humiliated. But the Emperor Hadrian (as reported in his biography by Spartianus[e]) ordered that bankrupts of this sort be flogged and exhibited[3] in the forum—a passage that Alciati did not recall. This question is discussed also by the canonists.[f] Jason[g] mentions none of the above details in his treatment of the topic, stating simply that the statute is not valid.

42 Baldus[h] adds that, after surrender of his estate, a man may not [**118**] change his mind, if the action was taken before a judge and with the consent of the creditors. He cites *Digest*, XLII. iii. 8, which does 43 not so state; but therein is the declaration that one who surrenders his estate must first acknowledge his debt, and have sentence passed upon him or admit his obligation.

For this rule there may be two reasons: (1) that there be security for the creditor at whose instance the surrender is made, so that he be not obliged later, perhaps in the company of other creditors, to establish his claim, as Bartolus[i] pointed out; or, again, (2) that the creditor may be secured in regard to a balance (if from the goods surrendered 44 he does not realize his claim[4] in full), in case the debtor should improve his condition; for the claim holds good against such a contingency.[j] But understand, however, that with reference to later acquisitions the debtor is dealt with in a more civil and courteous fashion, and, of course, on the basis of his ability to pay.[k]

[a] *On Code* VII. lxxi. 8.

[b] [On this see *Statuta Mantuae*, lib. 2, cap. 21, ex Cod. reg. 4620; quoted in Du Cange's *Glossarium*, vol. ii, p. 280, ed. 1883–7.]

[c] *Lib. Parergon*, II. chap. xlvii.

[d] Theodosian *Code*, IV. xx. 1; Justinian, *Novels*, 135.

[e] [chap. xviii.]

[f] *On Decretals* III. xxiii. 3.

[g] *On Inst.* IV. vi, § *Cum quaestio*, no. 19.

[h] *On Dig.* XLII. iii. 9.

[i] *On Dig.* XLII. iii. 8.

[j] *Dig.* XLII. iii. 4.

[k] *Ibid.*, at the beginning.

[1] [For *meliusquam* read *meliusque*.—Tr.]
[2] [*nūcium*, i.e. *nuntium*.—Tr.]
[3] [The original reads *catomidiari . . . iussit* ('he ordered to be flogged').—Tr.]
[4] [*es*, i.e. *aes*.—Tr.]

In regard to my remark that a debtor may not change his mind, Bartolus[a] (against Baldus) takes the other view; and there *are* such statements[b]—with exception, however, in case the goods have already been sold.[c]

As for my statement that claim is made upon the debtor after surrender of his estate in case his condition improves,[1] understand that he is liable not as before for the full amount, but only to the extent of his means.

And in regard to the debtor's subsequent acquisitions, the reckoning is based on amount and not on kind, according to *Digest*, XLII. iii. 6—a ruling on the basis of which Bartolus there says that we should consider what the income from a thing is, and not what its character. Thus, according to him, if it were a large mansion, or something of that sort, the creditor would be reimbursed on the basis of the income from the rent.

Hence Angelus[d] stated that, at Rimini, with his brother Baldus he rendered a decision to the effect that when maintenance is owed in 45
amounts proportionate to the resources of an estate, this should be paid in accordance with the amount of the income, and that the land itself should not be sold, even though the income is insufficient; but that the reverse is true when maintenance is owed outright.

As a unique case which he says is not found elsewhere in law, he cites *Digest*, XLII. iii. 6, following Bartolus there. So on *Digest* XXXIV. i. 22, Bartolus states that lands should not be sold to supply maintenance, and he is followed by Imolensis[e] and Alexander[f]; and this principle could be supported more at length. But Alexander[g] claims that the rule of Bartolus holds only when maintenance is due from a claim based upon gift, and not if it is due from an encumbering claim.

But Baldus[h] otherwise understands the words: 'whether from the amount of that which is acquired, or, on the other hand, from its kind' (for which see *Digest*, XLII. iii. 6). For he says that regard is had 46
for the amount, i.e. the ordinary valuation, but not for the kind, i.e. the appraisement of sentiment.[i] This he stated also on *Digest* XII. vi. 8, at the end—[118′] an interpretation which the above law will not bear, for it recognizes merely a difference between 'how much' and 'of what kind'. And there cannot be quality apart from quantity; for quality has no basis except in substance.[j]

But since it is stated in that law[2] that if a man surrenders his estate and afterwards acquires a modicum, his property is not subject to sale a second time, the question arises: What shall be the criterion, so that we may know whether his acquisition is a modicum or an abundance? And the answer is that it is the quantity and not the kind that is to be taken into account. For suppose that a large mansion belonging

[a] *On Dig.* XLII. iii. 8, the words *quaero utrum post cessionem.*
[b] *Dig.* XLII. iii. 5 and 3.
[c] *Code*, VII. lxxi. 2.
[d] *On Dig.* V. iii. 5, at the beginning.
[e] *On Dig.* XXXVI. i. 52, col. 1.
[f] *Consilia*, Bk. I, 100, beginning: *Super primo casu*, at end.
[g] *On Dig.* XXIV. iii. 12, at end.
[h] *On Code* IV. xxvi. 2.
[i] *On Code* IV. xxvi. 2, the words *iuxta praedicta.*
[j] *Dig.* XII. i. 41, at the middle.

[1] [For *supervenientis* read *superventis*.—Tr.]
[2] [i.e. *Digest*. XLII. iii. 6.—Tr.]

to his family should fall to a debtor by legal inheritance—one that it would not be seemly to sell,[a] surely its 'quantity' will be reckoned as its value in the way of revenue, and not as its market value.

[a] See *Dig.* IV. iv. 35; *Code*, V. xxxvii. 22, § 3.

(And although according to this interpretation there seems a confusion of the exact meanings of these terms 'quantity' and 'quality', nevertheless Tiraqueau,[b] citing this same *Digest*, XLII. iii. 6, stated that quantity and quality have almost the same content.)

[b] *De Utroque Retractu*, gloss 21, no. 2.

I hold, too, that in this case the judge will determine what ought to be done from the point of view both of amount and kind. This is indicated by *Digest*, XLII. iii. 7 ('if, however, such property', &c.); for the word 'such' surely refers to kind.

Baldus,[c] moreover, says that it is a matter of discretion with the judge, whether, in view of the standing of the debtor, a valuable house or castle should be sold. As for *Digest*, XLII. iii. 6, he declares that the quality (i.e. whether it is prized) is not taken into consideration, but its market value should be looked into.

[c] *On Code* VII. lxxi. 8, the words *quaero quidem.*

Why reimbursement is made to the creditors out of the original estate through the sale of everything, whereas the rule is different in regard to later acquisitions, is explained in *Institutes*, IV. vi, § 40, namely that it would be a cruel thing[1] to condemn a man to payment in full after all his property had once been taken away.

47 Furthermore, I believe that in the case where a debtor is driven to the above-mentioned surrender of estate with loss of standing, the man is cleared of all further obligation, so that even though he afterward acquires property, the creditor has no additional claim upon him, having once brought upon him such dire disgrace; cf. *Digest*, XLVII. ii. 57, § 1. (This I remember to have read somewhere else, though I cannot now locate the passage.) And since[2] the discussion has arrived at this point, it will perhaps be worth while for me to add some details tending to clarify[3] the subject.

48 The standing rule, then, is that any debtor whatsoever may surrender his estate, be he head of a family or son, woman or man (see *Code*, VII. lxxi. 7, where Bartolus and others comment); in fact this is true also of a collective body, e.g. a corporation or church.[d]

[d] *Authent.* III. *praef.*, near end.

The above rule is restricted by Jason[e] in twelve ways. But in 49 regard to the twelfth restriction he falls into difficulty, in that Baldus[f] (whom he cites) declares that a person who has the means [**119**] to liquidate his debts may not surrender his estate (being followed by Nicholas of Naples[g]), whereas a passage in *Digest*, XIV. iv. 7, § 1 is against this. With that passage Jason here takes issue, forgetting what Baldus said on *Code* VII. lxxi. 8,[h] namely that even a person who really owes nothing may surrender his property with the idea of avoiding

[e] *On Inst.* IV. vi, § 40, cols. 3 and 4.

[f] *On Code* VII. lxxi. 1, col. 2, the words *quaero numquid ille.*

[g] *On Inst.* IV. vi, § 40.

[h] The words *quaero cum nemini.*

[1] [For *inhumatum read inhumanum.*—Tr.]

[2] [For *postque* read *postquam.*—Tr.]

[3] [*inotescat*, i.e. *innotescat.*—Tr.]

undeserved annoyances and the ill-will engendered by lawsuits. So a gloss there holds; and this makes for the man's peace, though not for the convenience of creditors, and it seems the better view.

Another point worthy of note is the fact that a man who has once surrendered his estate is not the only person who is called on to pay merely to the extent of his ability, and with the proviso that he be not reduced to want; for there are numerous other classes that enjoy this 50
privilege. These you will find listed in *Digest*, XLII. i. 16 and in many laws thereafter following, and I here enumerate them:—partners in full, parents, patron, patroness, with their parents and children, husband, father-in-law on either side (whether of the husband or the daughter-in-law), but with a reservation;[a1] and soldiers (including also soldiers of the Emperor's court[b]).

[a] *Dig.* XLII. i. 21 and 22.
[b] Gloss on *Dig.* XLII. i. 6.

In like manner, those who are burdened with public office or duties 51
are held liable[2] only to the extent of ability; for they are not forced to surrender[3] their property. This seems to me the necessary interpretation of *Code*, VII. lxxi. 5, though the Doctors all understand differently. For they interpret this law to mean that a person may not surrender his estate for the purpose of shirking public duties; though this does not fit with the wording of the law ('that surrender with loss of standing be allowed'), nor with *Code*, VII. lxxi. 3, where it is stated that a father surrendered his estate because of civic burdens. In addition to this interpretation of mine (which is the one commonly accepted), the gloss there[c] offers another, to the effect that the reference is to a person who, summoned to a service for which he is not equipped, is obliged to surrender his estate; but this does not fit with the expression 'be allowed'.[d]

[c] *On Code* VII. lxxi. 5.
[d] See *ibid.*

Likewise, a voluntary giver enjoys this privilege; and he[4] alone deducts his debts, in addition to an allowance essential to respectable living,[5] making payment to the beneficiary out of the residue. But others do not deduct their debts.[e]

[e] *Dig.* XLII. i. 19, § 1.

Possibly it might even seem that it could be said that the voluntary 52
giver is the only person[6] of whom payment is demanded with the proviso that he be not reduced to want, as is suggested by *Digest*, XLII. i. 19, § 1 ('in fact I do not think that all that he has should be taken from him'); for if this is the regular procedure for all who are subject to such liability, why was it necessary to insert those words in this connexion? However, there is difficulty with a passage in *Digest*, L. xvii. 173, near the beginning. But I have held that that law should be restricted to certain persons, as the first gloss there suggests. Note, however, that every one else understands otherwise.

[1] [For *ut ut* read *ut.*—Tr.]
[2] [For *conveniuntnr* read *conveniuntur.*—Ed.]
[3] [For *cædere* read *cedere.*—Tr.]
[4] [For *ipsæ* read *ipse.*—Tr.]
[5] [For *condignumvictum* read *condignum victum.*—Tr.]
[6] [For *ipsę* read *ipse.*—Tr.]

In any case, that expression 'with the proviso that he be not reduced to want' the Doctors interpret as referring to respectability and comfort; so the gloss on *Digest* L. xvii. 173, and thus Decio[a] explains. Moreover, the standing of the person will be taken into account.

[a] On *Dig.* L. xvii. 28, at end.

53 Another noteworthy point under this head is that, when this privilege [119′] of not being held accountable beyond the limit of ability is applied out of pity, if there is a similar and equal claim for pity on both sides (i.e. in the case of the debtor and of the creditor), the creditor will have the preference, if he presses the point of escaping loss. So Bartolus on *Digest* XXIV. iii. 12[b] (with fuller treatment by Alexander there), and on XXIV. iii. 36.

[b] The words *quaero quid si maritus*.

54 We must remember, finally, that the recourse of surrender of estate was not at once developed by Roman law. In fact, at one period debtors were to such a degree at the mercy of their creditors that not even their persons were immune, as is shown by Livy's account. For he says[c] that the populace[1] and individuals imprisoned[2] for debt were complaining that, fighting[3] in the field in defence of liberty, at home they were captured and oppressed by their fellow citizens. And shortly afterwards[d] debtors, bound and unbound, poured into the streets from every direction. At length[e] an order was issued by the consul that no one should keep a Roman citizen bound or in confinement, and that[4] no one should take possession of or sell the property of a soldier while he was in the field, or arrest his children or grandchildren—words which show that the creditor had a claim also upon the family and household of the debtor.

[c] II [xxiii. 2].

[d] [Livy, II. xxiii. 8.]

[e] [Livy, II. xxiv. 6.]

And matters came to such a pass that the plebeians withdrew to the Sacred Mount,[f] where they were granted tribunes to protect the commons against the patricians and any injury from that class. This happened in the seventeenth year after the expulsion of the kings, according to Pomponius.[g]

[f] [Livy, II. xxxii. 2 ff.]

[g] In *Dig.* I. ii. 2, § 20.

As for surrender of estate, the Julian Law was passed later, affording this relief of surrender to Roman citizens, and perhaps to all Italians. Finally, by imperial enactments it was extended also to provincials.[h] Perhaps, however, this privilege was secured by petition from the Emperor, as is suggested by *Code*, VII. lxxi. 8, near the beginning; though the gloss there understands with the words 'from our majesty' the phrase 'or other judge'. But at the present time this sad expedient is everywhere available.

[h] *Code*, VII. lxxi. 4.

55 The question of the possibility of refusal to surrender one's estate
56 is discussed at length by Felinus.[i] Observe, however, that even though refusal is ineffective, such action nevertheless entails this disadvantage

[i] *On Decretals* II. ii. 12, col. 1, and II. xxiv. 9, col. 3.

[1] [*Plebei*; i.e. *plebeii*.—Tr.]
[2] [For *nexe* read *nexi*.—Tr.]
[3] [The expression in the original is more logical.—Tr.]
[4] [*non*; i.e. *neu*.—Tr.]

that, on account of it, a man forfeits the relief that perhaps otherwise would be open to him, namely that he be not held to account beyond the extent of his means. So Romanus.[a]

And this privilege is not open to a person who is charged with 57
wrongdoing, even if it be a question of money and a civil process. So Baldus.[b]

Know, finally, that when a person desires to surrender his estate 58
in order to secure release from prison, all the creditors must be notified. For in this case the rule of law does not hold 'What may be alienated against the will', &c.,[c] unless the man was imprisoned at the instance [120] of one creditor only; for then it suffices to notify that one alone.[d]

I now take up again the subject of safe-conducts, on which Baldus[e] says many things that should not be forgotten. First, that this protec- 59
tion does not cover crime. And understand this of crimes in the past; for regarding crimes to be committed there is no room for doubt.

It does not extend either to debts to the fiscus, the reference being 60
to another's fiscus, not that of the grantor. Further, in the third place, it does not protect runaway slaves, unless expressly so stipulated.

Again, in the fourth place, it is subject to the restriction that no one shall grant against another what he would be unwilling to have granted against himself. And a concession touching debts does not apply to crimes.

A safe-conduct issued to a thief does not avail him if he travels 61
with the stolen goods—because of recent handling, which constitutes a fresh crime.

And a permit for one's own belongings does not include those of others. This decision was rendered against the officer of a certain great lord who had absconded with the latter's funds. Bearers of safe-conducts, therefore, should take warning.

Add also, on the subject-matter of *Code*, VII. lxxi. 8, Alexander's 62
statement[f] that a person who wishes to enjoy the five-year respite above mentioned must give security as regards payment at the end of that time, citing *Code*, I. xix. 4. Albericus,[g] however, takes the other view, and comments on *Code*, I. xix. 4,[1] to the effect that it refers to a post-ponement allowed by the Emperor—the case being otherwise, if it is allowed by the creditors. And if the question is raised how security is to be given to the creditors, assume that it will be by imprisonment, as was said above. And this seems the better view.

Alexander[h] also said that a safe-conduct does not cover a debt 63
secured by oath, unless otherwise therein provided; and this he repeats.[i] Felinus[j] treats the matter fully; so Alexander[k] again.

As to the question whether a safe-conduct includes persons of

[a] *Decis.* 567 (*Nota quod secundum aliquos in antiquis*).
[b] *Consilia*, Bk. I, 400, beginning: *Iacobus*, at end.
[c] [*Dig.* L. xvii. 26]; so Baldus, *Consilia*, Bk. I, 301 (*Ad evidentiam*)
[d] So Baldus, as above.
[e] *Consilium* 400, above cited.
[f] *Consilia*, Bk. II, 205 (*Visis*), the words *secundo casu*.
[g] *On Code* VII. lxxi. 8.
[h] *Consilium* 205, above cited.
[i] *Consilia*, Bk. III, 38, col. 2.
[j] *On Decretals* I. iii. 19.
[k] *Consilia*, Bk. VI, 137, col. 2, the words *circa secundam dubitationem*.

[1] [Before *universa* omit *quod*.—Tr.]

higher rank than those specified, or even the grantor himself, see Alexander once more.[a]

64 And if the lord of a castle grants assurance of safety to traders in his castle, and, because of hostility to this lord, the enemy attack the castle and plunder those traders, de Ancharano[b] stated that the grantor is bound to make good to the latter their losses.

Other points under this head will reward the search of a more diligent investigator.

[a] *Consilia*, Bk. VI, 235, beginning: *Post redditum consilium*, col. 9, and last col.

[b] *Consilium* 122, beginning: *Visis pactis.*

[120]

HERE BEGINS

THE TENTH PART OF THE WORK

# CHAPTER I [121]

## ON PEACE

## SYNOPSIS

1 Things contrary are by nature related.
2 The end of mirth is heaviness.
3 The ending of war is peace.
4 War should be waged only to secure peace.
5 Peace should be sought for and welcomed.
6 Laudation of peace.
7 Peace from sin.
8 If you desire peace, prepare for war.
9 War is safer than a treacherous peace.
10 What peace is (see also the next chapter, number 26, near the end).
11 Three kinds of compacts.
12 When war is over all its issues are disposed of.
13 Persons banished before a war are not reinstated as a result of the peace that follows.
14 Estates lost on account of a war should be restored after peace is made.
15 When peace comes, movables and immovables should be restored.
16 Peace is a sort of restoration in full.
17 Peace terms are to be given precedence as law above all else.
18 Whether goods should be restored to rebels after peace is made, and under what conditions.
19 Whether property is automatically confiscated in case of treason.
20 Whether indulgence and amnesty for a crime protect property.
21 Whether reinstatement by a sovereign covers goods transferred to a third party.
22 If debit accounts are[1] collected during war, what shall be done with regard to them when peace comes?
23 Whether war is founded on Roman law.
24 Strangers (*exteri*) and enemies are far different.
25 Who are strangers (*exteri*).

To turn now at length to a more quiet and attractive subject, we
1 must recognize the fact that it has been so arranged and ordered by nature that opposites are bound up together; and the things which appear to men to be utterly opposed are yet connected with one
2 another. Here applies the saying of Solomon, that wisest of all men, that the end of mirth is heaviness.[a]

So death follows life with no interval (wherefore it is said life runs over into death[b]), and so that which ceases to cool begins to grow warm. This is what Plato refers to in the *Phaedo*, when he says that all things are thus produced, i.e. opposites from opposites, and that there is a mutual development from one into another. Thus, too, a Roman poet sings in the following strain:[c]

> Yet all things from each other spring, and back to them revert.
> Disintegrating earth to water turns; the moisture rarified[2]
> To air and aether speeds[3] afar; and aether, every weight removed,
> Straight wings its way to regions of the purest fire.
> Then back they turn, a like mutation to repeat.

[a] [*Proverbs*, xiv. 13.]

[b] *Dig.* XL. iv. 18.

[c] [*Ovid, Metamorphoses*, XV. 244 ff.]

[1] [For *sit* read *sint*.—Tr.]
[2] [For *tenuatur* read *tenuatus*.—Tr.]
[3] [For *habet* read *abit*.—Tr.]

It is not strange that we, too, following nature's lead, should 3
associate peace with war, recognizing it as a sort of relative and con- 4
nexion. For the intent of a people or a king at war should be naught
else than to attain to peace.[a] And wars should be waged, not out of
greed and cruelty, but in the desire for peace.[b] Hence Calderinus[c] said
that we go to war in order that we may live unmolested and at peace.

And this was the view of Cicero; for thus he speaks:[d] 'War should 5
be undertaken in such wise that it be evident that nothing except peace
is aimed at.' And the voice of Scripture[e] bids that peace be sought
after, embraced and kept: 'Seek peace', it reads, 'and pursue it.' In
another Psalm[f] it is said: 'Justice[1] and peace have kissed.' And Isaiah[2] 6
declared[g]: 'The work of justice shall be peace.'

Our Lord and Saviour, coming down to earth, directed that peace
be announced and proclaimed[3]: 'Glory to God in the highest, and peace
to men of good will.' Again, upon his return to the heavens, he left
it to his friends as his choicest gift, saying: 'Peace I leave with you; my
peace I give unto you.'[h] Paul bids us to cherish it, when he says:[i] 'We
have been called to peace'; and again when he remarks:[j] 'God, the
author[4] of peace.' [121′] Hence also he exhorts us,[k] so far as in us lies, to
live peaceably with all men.

No wonder then that St. Thomas[l] calls it the virtue and sentiment[5]
of love; and he adds that all created things yearn for it. I admit, how-
ever, that nearly all of the above quoted references have to do with 7
peace of the soul. Hence in one of them there is the addition: 'not as
the world giveth, give I unto you'. Such too was the viewpoint of the
prophet where he says:[m] 'There is no peace to the wicked.'

For just as there is a spiritual warfare—of which we read in the
Epistle of St. James[n] ('the wars in you',[6] he says, 'of your[6] lusts'); and
Job's idea about this[7] was similar when he said: 'A warfare[8] is the life
of man upon the earth' (which I quoted at the beginning of this work)
—so, too, there is a spiritual peace, namely when our passions are con-
trolled by reason, and our lower nature is not at war with the higher.

But even the ordinary peace of the world generally is eagerly desired
and highly acceptable. Of this the peerless poet sang, when he said:[o]

> Again for Latium[9] who the golden age shall usher in,
> O'er fields that once were Saturn's realm . . .

This is the peace which a gloss[p] states is banished far from us by six
circumstances.

[a] *Decretum*, II. xxiii. 1. 3.
[b] *Decretum*, II. xxiii. 1. 6.
[c] *Consilium* 1, *De Treuga et Pace.*
[d] [*On Duties*, I. 80.]
[e] *Psalms*, xxxiv. [14.]
[f] [lxxxv. 10.]
[g] [xxxii. 17.]
[h] [*St. John*, xiv. 27.]
[i] [Cf. 1 *Corinthians*, vii. 15.]
[j] [1 *Corinthians*, xiv. 33.]
[k] [*Romans*, xii. 18.]
[l] *Summa*, II. ii. [qu. 29,] arts. 3 and 4.
[m] [*Isaiah*, lvii. 21; cf. xlviii. 22.]
[n] iv [1].
[o] [Virgil, *Aeneid*, VI. 792 ff.]
[p] *On Sext* II. xiv. 2, the word *pacem.*

[1] [The *Vulgate*, which Belli quotes, has *iustitia* (justice) in this and the next passage cited. The *King James Version* reads *righteousness*, the *Douay Version, justice.*—Ed.]
[2] [*Esæ*, i.e. *Isaias.*—Tr.] [3] [For *praecivi* read *praecini.*—Tr.] [4] [*autor*, i.e. *auctor.*—Tr.]
[5] [*virtus affectumque charitatis.* As a matter of fact, St. Thomas calls peace the *virtus* and *effectum* of charity. The Latin text may contain a misprint here.—Ed.]
[6] Reading *vobis . . . vestris* for *nobis . . . nostris.*—Tr.] [7] [For *qua* read *quo.*—Tr.]
[8] [*militia.* This corresponds to the marginal reading in the *King James Version* (*Job*, vii. 1), and to the text of the *Vulgate* (*ibid.*).—Tr.] [9] [For *quae rursus latro* read *qui rursus Latio.*—Tr.]

8 However, peace is assured and made secure, if a sovereign is prepared for war—a principle which our Lord approves when He says:[a] 'When a strong man armed keepeth his palace, his goods[1] are in peace'. And it is a common saying: 'If you desire peace, prepare for war.' This idea is expressed by Vegetius[b] also in the following words: 'He who wants peace should make ready for war.'

9 Moreover, war is preferable to a doubtful peace, according to Cornelius Tacitus;[c2] and so Cicero[d] also said in a passage previously cited ('a peace that will involve no insincerity'). And with this accords the high-spirited reply of the Privernian in the Roman Senate: 'If you grant us a righteous peace', said he, 'we will keep it forever, but a bad peace we shall not keep long.'[e]

Baldus[f] also declared that peace ought to be real and enduring; and if insincerity lurks in it, it is not peace, but deceit. But as to what he adds from St. Augustine, to the effect that as long as strife continues there is no real peace—this refers to peace of the soul.

It is not at all strange, therefore, that our rulers so frequently renew compacts, truces, armistices, peace, and war; for it is under the stern stress of necessity (particularly emptiness of the treasury) that they have recourse to peace—not because of peace in the soul or pity for the masses, nor in fine because of reverence and fear of God. No wonder then that when the treasury is refilled, and, so to speak, the cause is eliminated, the effect (i.e. peace) disappears also.

Baldus[g] sang a very encomium upon peace. To take up, then, [10] some points that bear upon this subject, [**122**] I ask, first: What is peace? Rejecting the definition of Geoffrey, Bartolus declares that peace is nothing else than an agreement by the terms of which a war already begun is brought to an end. See his statement.[h]

In another passage Baldus[i] declared that peace is nothing else than the terms of a peace pact. Perhaps, however, the definition of Geoffrey is preferable; for there can be peace apart from pacts and terms, as when a sovereign, after subduing the enemy and at times exterminating the entire royal family, grants peace to a country, as did Alexander, the Macedonian, after subduing Darius; so the Turks, after taking Constantinople.

Romanus,[j] too, had much to say regarding peace; so Giovanni da Legnano.[k] But there is a different bearing in the remark of Augustine[l] that peace is nothing else than duly established concord.

11 Livy reviews all the kinds of compacts by which kings and peoples unite in friendship: (1) When conditions are imposed upon the vanquished; for when everything has been surrendered to one who[3] has been victorious in the field, his is the right and power to determine

[a] [*St. Luke*, xi. 21.]

[b] *Rei Militaris Instituta*, III, *praef.*

[c] [*Histories*, IV. xlix. 2.]

[d] [*On Duties*, I. 35.]

[e] [Livy, VIII. xxi. 4.]

[f] *On Feuds*, Bk. II. liii, at the beginning; last words.

[g] *Titu. De Pace Constantiae*, at the end, no. 3.

[h] *Consilium* 66, beginning: *Ad declarationem.*

[i] *Consilia*, Bk. II, 195, beginning: *Laudare vos et commendare*, col. 2, the words *praeterea dato.*

[j] Last *Consilium*, col. 5.

[k] *De Pace, passim.*

[l] *On the City of God* XII.

[1] [For *omniáque* read *omnia quae.*—Tr.

[2] [The quotation is inexact.—Tr.]

[3] [For *qu* read *qui.*—Tr.]

what he wants taken from the conquered, and what they may retain: (2) When parties well matched in a war enter upon peace and friendship on equal terms; for then possessions are claimed and surrendered according to agreement; and if the ownership of anything has been confused by the war, adjustment is reached on the basis of equity,[1] or in accord with the terms[2] of earlier law, or with regard to the convenience of both parties: (3) When those who have never been enemies agree to inaugurate friendship by a friendly compact; in which case neither party imposes terms nor accepts them, for that is the procedure between victor and vanquished. So Livy.[a]

[a] [XXXIV. lvii. 7 ff.]

Not unlike the above-mentioned first class was the peace which the Emperor Charles imposed upon the Duke of Saxony[3] and the other Germans who sided with the Duke. The second variety is illustrated by the oft-repeated pacts of the same Charles with Francis, King of France, and also with Henry, from 1526 up to 1558—the year in which I am writing this, and in which peace has been made between Philip, King of Spain, and Henry, the above-mentioned King of France, with restitution to Emmanuel Philibert, Duke of Savoy, of the cities and territories which he had lost in the war, the French, however, retaining five cities in the Piedmont district, namely Turin, Chieri, Villanova, Pinerolo, and Chivasso, which are to be restored after the lapse of three years; and with a discussion and elucidation meanwhile of the rights and claims which the aforementioned King of France also advances against the Duke himself and the cities held by him—a peace which may it please God to make lasting![4]

Next I raise the question: In the same manner that war is done away with by peace, are all concomitants of a war likewise disposed of? Baldus[b] states this to be the case. And again he so implies;[c] [122′] for he holds that sentences issued against rebels on the score of rebellion and war are counted as cancelled when peace has come;—but not if the sentences have a different basis (e.g. in a case of debt, or other civil action). 12

[b] On *Titu. De Pace Constantiae*, § 4, no. 38.

[c] *Ibid.*, § 15, no. 82.

Hence I infer that the exiles from Milan, who previous to the war had left that place because of crimes (being banished, as we commonly say), were not rated as restored to their country, despite the fact that, in the compact and peace, there was a general amnesty for rebels—unless the scope of the agreement suggests otherwise. [13]

[d] *Ibid.*, § 16, no. 85.

Baldus[d] infers also that estates lost on account of war, and which a person previously owned,[5] ought to be restored to the original owners when the war is over; and if these selfsame persons meanwhile[6] have 14

[1] [*Simul*; reading doubtful.—Tr.]

[2] [Text of the original doubtful. Some editors insert *formula* after *ex.*—Tr.]

[3] [John Frederick I.—Ed.]

[4] [Apparently Belli is here describing the treaty of Cateau Cambrésis; in which event, the date 1558 should read 1559.—Ed.]

[5] [For *eum possidebant* read *id possidebat.*—Tr.]

[6] [For *interint* read *interim.*—Tr.]

reoccupied the estates, they should be protected in their possession; so, if a claimant institutes action for the spoil, he will be met by the exception *dolo petis*. This Baldus[a] repeats.

Angelus[b] says also that, when peace has come, there should be restored to the former owners, not only the immovables seized in the war, but the movables also. However, he is speaking of cases when it has been so provided in the agreement.

And with the statement of Baldus above cited[c] there is agreement on the part of de Afflictis,[d] who holds that peace has the effect, not merely of a simple indulgence, but of a restoration in full—even to the loss of a third party to whom perhaps the property has been transferred. In support of this he cites Fulgosius[e] and Alexander.[f]

My opinion is that, above all else, the terms and the phrasing of a pact should be scrutinized; for they have the effect of law. Thus: (1) They may be so generous in scope that they can be made to cover everything, and in that case everything will be included, even movables, as Angelus said; for agreements must be honoured:[g] or (2) Mere peace is made, with pardon for rebels, but with nothing said of the restoration of property; and then I do not think that the rebels recover their goods, especially such goods as have been transferred to a third party; for the sovereign who transferred them is bound by the law of contract.[h] So Baldus,[i] who quotes Cino to the effect that this verdict was rendered at Bologna.

(There is support in what Bartolus[j] said in regard to very similar situations, where he distinguishes between a simple indulgence and one with a specification, and between a qualified restoration and an absolute or unqualified restoration. For a qualified restoration is limited by its specifications, whereas the unqualified includes everything. As for the difference between indulgence and restoration, see a gloss.[k])

Angelus,[l] however, comments baldly and without qualification, saying that a restoration granted by a ruler is never made to include alienated property—in fact, not even income from such property which the fiscus has previously absorbed. [123] And for that reason he warns exiles to be careful, and to see to it that there be added in the articles of the compact a phrase which covers even goods that have been alienated. This, he says, was done in the peace made between the Perugians and the Apostolic See.

But, taking up this subject[z] more comprehensively, I believe that we should distinguish along the lines recognized by the Doctors; thus:

(1) We are dealing with acquittal by a judge, though a person has actually committed a wrong; then acquittal avails nothing. So de Afflictis,[m] who here cites d'Isernia, the latter declaring[n] that if the sovereign has granted an indulgence to the first-born son of a vassal, who

[a] *Ibid.*, § 20, no. 92.
[b] On *Code* VIII. l. 19.
[c] *Titu. De Pace Constantiae*, § 4.
[d] *On Feuds*, Bk. II. 14, chap. i, col. 11.
[e] *Consilium* 163.
[f] *Consilia*, Bk. II, 190 and 216.
[g] *Dig.* XVI. iii. 1, § 6; L. xvii. 23.
[h] *Code*, I. xiv. 4, with its subject-matter.
[i] *On Dig.* XXVIII. ii. 29, § 5.
[j] *On Code* IX. li. 13, col. 3, the words *et pro huius*.
[k] *On Inst.* I. xii, § 1.
[l] *On Dig.* XXVIII. ii. 29, § 5, last col., no. 2.
[m] *On Feuds*, Bk. II. XXIV, chap. i, § 3, gloss 3, no. 90.
[n] *Ibid.*, § 2, col. 5, § *Item quid si princeps*.

[z] [i.e. of reinstatement.—TR.]

has committed a felony, it is the same as if the son had not committed the crime, and he will therefore succeed in the fief, to the exclusion of a brother of his. But the case would be different, he says, if the son had been cleared by a judge. He cites *Digest*, XXIII. ii. 43, § 12 ('because the law recognizes stigma in the act, and not in the verdict'), and XLIX. xvi. 4, § 6. And that there is a difference between the powers of sovereign and judge is shown by *Code*, III. iv. 1.

But whatever the Doctors may say, I should think that if a judge, after trying a case between the fiscus and a vassal, should acquit the defendant, the latter will be secure—as much so as though he had been acquitted by the sovereign. For a verdict has the force of law,[a] especially in criminal cases; so Baldus there.[b]

[a] *Dig.* I. v. 25, *etc.*[1]
[b] col. 2.

And there is no difficulty with the rulings in *Digest*, XXIII. ii. 43, § 12, the case there being far different. For the mere fact of detection imposes the brand of adultery; and it is not strange that acquittal avails nothing. The same is true also of *Digest*, XLIX. xvi. 4, § 6. For dismissal itself brings disgrace, without the formality of a sentence; and it is no wonder that acquittal helps not at all.

I should say the same, too, in any other case whatsoever where the law immediately and automatically prescribes a penalty for crime, e.g. the crime of treason.[c] For in these cases acquittal at the hands of a judge would not alter the course of the law. (As for my mention of the crime of treason, you will find a fuller discussion in the following chapter, under number 76.) Or:

[c] *Code*, IX. viii. 6.

(2) We are speaking of indulgence; and thereby I mean remission 19
for crime and guilt, and, in consequence, of its punishment. But property is not restored.[d] There is exception, if some more generous provision is made in the indulgence; for that should be observed.[e] Or:

(3) There is restoration, and thus something more than simple 20
indulgence; and then property is included, if it has not yet passed[2] into the hands of a third party. If, however, it has been so transferred, the 21
reverse is true. So Bartolus;[f] and this is in general[3] the view of all.[g] But—

[d] Glossator on *Inst.* I. xii, § 1, last gloss. Supported also by the rulings in *Code*, IX. li. 2, 4–7, and 9.
[e] *Code*, IX. li. 12.
[f] *On Code* IX. li. 13, col. 3.
[g] *On Dig.* XXVIII. ii. 29, § 5.

(*a*) There is a restriction, in that the above rule does not apply to a person at whose expense the fiscus is found to have been enriched; e.g. if it has disposed of the property by sale; for then it will repay the price. [123′] So Bartolus argues;[h] and he uses this idea also against the view I have quoted above (citing Angelus)[i] regarding income absorbed by the fiscus before the transfer of the property to a third party. Yet he is talking of actual reinstatement; hence perhaps he is wrong.

[h] *On Code* IX. li. 13, col. 3.
[i] *On Dig.* XXVIII. ii. 29, § 5.

(*b*) Another qualification is: unless the third party to whom the property was transferred has secured it by legal process based on the verdict of 'guilty' pronounced in regard to the original crime. For

[1] [*Si., i.e. similibus.*—Tr.] [2] [For *sit* read *sint.*—Tr.] [3] [*cōis*, i.e. *communis.*—Tr.]

alienation which rests directly upon a sentence is cancelled, if the sentence is reversed, even if reversed by restoration. So Angelus said,[a] the statement originating with Cino on *Digest* XXVIII. ii. 29, § 5, as Alexander there[b] reports. It is strongly supported by *Digest*, XXXVII. xiv. 21; and there is a very similar passage in *Digest*, XXXVIII. ii. 3, § 7. Moreover, Imolensis is not in opposition on this point, though on the last named passage he says that in *Digest*, XXXVII. xiv. 21, there was a sort of cessation, rather than a transfer—that is to say, by virtue of the sentence through which the master was sent into exile it seems rather that the man was eliminated than that a right was acquired by the freedman; and this cannot be denied.

[a] *On Dig.* I. vii. 41.

[b] Under no. 19, the words *quod intellege.*

And perhaps the same thing could be said touching another question regarding the allotment made by verdict to the heirs of a murdered man (let us say, to cover damages), in case the slayer afterwards secures restoration—howsoever much Baldus and Alexander may here dissent. For though that allotment is assigned in view of loss suffered by the injured party, still it might be said that the law refuses you its help—but not your own; for the restoration annuls the sentence and its whole effect, but the heir still has unimpaired the right to bring action *ad interesse*.

And the logic of this is that when such a claim is awarded a third party through strict application of the civil law, even in the face of natural law (which never deprives a person of his property because of crime), it is natural that the Emperor may temper this inflexibility. This explanation was introduced in the present connexion by Aegidius Bellamera.[c]

[c] *Decis.* 744, beginning: *His suppositis*, at the beginning.

Another distinction might be made according as: (1) the allotment assigned by the verdict to the injured party was due to him on other grounds, e.g. by statute, or (2) the judge made the allotment according to his sense of fairness. Thus, in the first case, restoration of the criminal will not revoke the allotment by verdict, according to the view of Bartolus. He is followed by the Doctors,[d] who conclude that if the Emperor forgives a crime, it is not counted that the penalty is remitted to the loss of a third party, whose claim was based upon something other than the sentence; as in the case of the law cited,[e] where the penalty or fine was adjudged to the patron on the basis of the common law. But in the second case, where the claim of the third party rests upon the sentence only, forgiveness of the crime will work to his disadvantage, according to the rule of Angelus above cited.[f] It would be difficult, however, and perhaps even dangerous, to depart from the received and commonly accepted view.

[d] *On Code* II. ii. 2.

[e] [*Dig.* XXXVII. xiv. 21.]

[f] *On Dig.* I. vii. 41.

(*c*) There is a third exception, namely if there is an express provision in the restoration. Whence Alexander[g] [124] warns the advocate to take great care to select properly the terms of reinstatement.

[g] *On Dig.* XXVIII. ii. 29, § 5.

However, doubt is cast on both the above reservations, in view of what Decio[a] said in criticism of the rule of Cino and Angelus, making many citations to the contrary. But, in the case under his consideration, restoration was effected through a subordinate, whose authority is less. But as regards a sovereign, I think that we should make a distinction according as it is a question of intent or of power.

[a] *Consilium* 525, no. 8.

Under the first head, either the alienation of property was made directly on the basis of the sentence, and then I think that we should hold with Cino and Angelus; or it was made by contract (even though for a nominal consideration), and then I think that the goods ought not to be restored.

In the other case, the intent of the sovereign is clear, and the question is whether he had the power to restore even property that had been alienated. And again I shall subdivide, according as the alienation was effected on the basis of a contract for a nominal or for an actual consideration. In the first case, the goods will be recovered; in the other, what Decio said[b] will hold, namely that they will not be restored —a view which he supports at length. But, to this last, add the qualification: unless the sovereign orders restoration on grounds having to do with the public weal, and especially if the property has been disposed of[1] to a subject. I refer you to a lengthy discussion of this matter by Felinus.[c]

[b] *Consilium* 407, no. 17.

[c] *On Decretals* I. ii. 7.

(*d*) There is exception, in the fourth place, when, though it is not explicitly provided in the reinstatement that property also is included, there yet is added some pregnant expression which so implies (e.g. the insertion of the word 'fully', or the like[d]).

[d] According to Felinus *On Decretals*, I. xxxiii. 8.

As to my statement above that peace restores everything to its original condition (so that what war has taken away is restored forthwith by peace), Romanus dissents at one point. For, says he, if the people of Pisa and of Lucca by courtesy were citizens mutually each of the others' state, and war should break out between them, terminating the privilege, the coming of peace would not re-establish that community. So he states in his *Consilia*,[e] where you may consult his arguments.

[e] 469, *Dub.* 2.

Further, in regard to my remark above that the income derived from property during the continuance of war is not to be paid back when peace comes, even though it is necessary to restore the property itself, this view is upheld by Albericus de Rosate and Saliceto;[f] also by Baldus.[g]

[f] *On Authentica* following *Code* I. v. 19 (*Idem est de Nestorianis*).

[g] *On Code* IX. li. 13, last col. but one, the words *item oppo. et videtur.*

I ask: What of the claims of indebtedness which exiles chance to hold in the state? And suppose: 22

(1) They were cancelled at the start, let us say because it was ordered by statute that all rights and actions of the exiles lapse; and in that case the claims certainly will regain their validity through the coming of peace and restoration. So Aegidius Bellamera.[h]

[h] *Decis.* 744.

[1] [Reading *distracta* for *districta*.—Tr.]

(2) They were transferred to the fiscus; and then distinction must be made between indulgence and restoration, as pointed out above.

(3) They were surrendered or presented to others, who realized upon them; and the question is raised whether the collector and beneficiary is bound to surrender his collections. And, in addition to what has been said above with closely approximate or exact bearing on this question, the exact terms of the pact should be scrutinized carefully. For as I have already said [**124′**] these latter must be regarded in the light of law. And unless they are very wide and general, they do not cover this case.

But if we raise the question whether a debtor may be called upon for payment a second time;—if we suppose that when the claim for collection arising through the war was settled, the debtor was already in arrears, he will be subject to a second demand. And he should take to himself[1] the blame for having to pay twice; for that account would not have been made over to a second party, if he had himself settled with the original creditor at the proper time. His fault, therefore, ought not to work injury to another.

Suppose, on the other hand, that the debtor was not in arrears; and then he will be secure, collection having been made to the loss of the creditor. See discussion at length by de Afflictis.[a]

This does not fit, however, with the remarks of Giovanni d'Andrea,[b] who says that Homobonus, a Doctor of Cremona, argued the following question: War broke out between the people of Cremona and Parma, and the commune of Cremona collected from one of its citizens a debt owed to a citizen of Parma. Query: Was the man secure from his creditor? He decided for the negative, citing from the *Digest*,[c] wherein it is stated that injury inflicted by a superior does not excuse against the claim of a third party. And, says he, there is no help in the law of war; for these warring factions were not genuine 'enemies'.

I hold that the other view is sounder; for I do not think that the assumption of this Homobonus is valid. For, supposing that those states were free at that time, each had the right to declare war, as I pointed out at the beginning of this work; so his reasoning is not sound: 'The Roman people did not declare the war; therefore they are[2] not enemies.'

[23] For Roman law did not introduce wars and the status of 'enemy'; rather, these conditions had arisen out of the law of nations long before the foundation of Rome, as is said in *Digest*, I. i. 5, where Albericus indicates assent in this connexion.[3] Therefore, what belonged to the enemy could be seized and conveyed to the fiscus; for the law of war so allows, as was shown above in detail in its place.

24 Further, as for the judgement of the above-mentioned Doctor that

[a] *Decis.* 250, beginning: *Rex Alphonsus.*

[b] *Addit.* to Durandus, on *tit. De Oblig. et Sol.* § *Nunc aliqua*, in *addit.* beginning: *Secundum Alber. Gal.*

[c] XXX. i. § 1; XXI. ii. 51; IV. ii. 3, at end; XLVII. x. 32.

[1] [For *sibiquæ* read *sibique*.—Tr. [2] [For *snnt* read *sunt*.—Ed.] [3] [*ter*, i.e. *terminis*.—Tr.]

the states in question were not enemies to one another in view of the definition of that term (for which see *Digest*, XLIX. xv. 24 and L. xvi. 118), but that they were nevertheless strangers, so to speak, and in the same category as peoples with whom there is no treaty or friendship—wherefore he falls into doubt about his own decision (inasmuch as between strangers enslavement is allowed) and leaves the point there undecided—this seems to me more absurd than that other statement of his which precedes. For it is inconceivable that two states, neighbouring and adjoining for so many generations in the past, should never have entered also into some association [125][1] of hospitality, friendship, peace, and marriage—especially as both were colonies of the Romans.

It does not follow, therefore, that if they quarrel,[2] or even if they have recourse to arms and war (even granting that they are not 'enemies' one to the other, as he assumes, but which I do not think is true, if we take for granted the authorization and justice of the war)—it does not follow, I say: 'They are not enemies; therefore they are strangers.'

For strangers are those who never at any time have been associated in friendship or by any treaty, being unknown either through war or peace,[a] such as were those far away nations to the Portuguese and Spaniards, separated by the long voyage across the Ocean. 25

*Dig.* XLIX. xv. 5, § 2.

## CHAPTER II

### WHO ARE INCLUDED IN PEACE PACTS

### SYNOPSIS

1 Whether peace includes the adherents of the contracting parties.
2 Peace, like an agreement, is a matter of strict law.
3 Whether adherents are included in a declaration of war. It is ruled that they are not, with refutation of the contrary opinion of Baldus.
4 'Adherents' variously defined.
5 Adherents little different from vassals.
6 Who are called 'adherents'.
7 Adherence[3] does not establish jurisdiction over the adherent.
8 Adherents are under protection, but not under jurisdiction.
9 Adherents should be defended even with force of arms; and see no. 32.
10 Adherents are assumed to have reserved the rights of their own lord.
11 A vassal may[4] give allegiance to another lord, if he can[4] not otherwise hold his own against his enemies.
12 One who gives allegiance to an enemy of his lord, loses his fief.
13 He who blazons upon his castle the insignia of a hostile lord, loses his fief.
14 Whether a servant who violates a peace makes his lord liable to the penalty for breach of the peace.

[1] [For p. 225 read p. 125.—Ed.]
[2] [For *dissentiam* read *dissentiant*.—Tr.]
[3] [For *adhaerentiam* read *adhaerentia*.—Tr.]
[4] [*pōt* i.e. *potest*.—Tr.]

15 A principal is under a different obligation from a follower or adherent.
16 A borrower is not responsible for accidents.
17 Those who disclose plans to the enemy are traitors.
18 Whether a person guilty of collusion should enjoy the benefits of peace.
19 The commanding general cannot make peace.
20 Whether the losses of war may be remitted in the making of peace.
21 Losses remitted in the making of peace are not remitted in the sight of God.
22 Soldiers who plunder in an unjust war are not excused in the sight of God because of compacts.
23 Holdings taken from friends for the purpose of defence should be restored to them when the war is over.
24 Things taken by one's own party, even though lost to the enemy,[1] must be made good by those who took them.
25 A lord may[2] fortify a stronghold of a vassal. But[3] he should turn it over to the vassal without remuneration at the end of the war.
26 [**125**] Forts may be constructed along the frontiers, even after peace has been made.
27 A new development does not fall within the scope of old compacts.
28 Peace is not counted[4] as violated by an unimportant act; nor even for grave suspicion should it be broken; and see no. 39.
29 A person does not break the peace who appropriates a profit accruing from something of his.
30 Peace terms are binding upon a successor.
31 Whether a vassal may be transferred to another in the interests of peace.
32 A king does not give away parts of his realm against the will of the inhabitants, and without consulting the nobles.
33 Whether peace in the interest of adherents includes also those who later enter that status.
34 It is the initial state that is regarded.
35 Peace is not violated if a new occasion provokes new injury.
36 A banished person is not immune from injury, though peace has been made with him. But understand this with the reservation here noted.
37 Whether peace is violated by adultery or theft; see also under no. 42, near the beginning, and no. 53.
38 Whether, in case of doubt, an injury is counted as due to an earlier grievance or to a new occasion.
39 Striking with the open hand or fist is a worse insult than a wound; and see no. 65.
40 An injury is considered in the light of many circumstances.
41 He is responsible for a quarrel who stirs up wrath.
42 He who is provoked to action by injury is not brought to trial for injury.
43 Whether peace is violated through the act of an adherent who had not yet ratified it.
44 The injured party does not violate a peace, if he injures the offender;
45 Even though the phrase be added: 'while the pact remains inviolate'; and see below, no. 51.
46 Ratification should not be forestalled by the adversary through headlong haste.
47 Whether the fine is paid to the injured person, or to all concerned.
48 He who makes peace for himself and his adherents is bound to arrange and see to it that they observe it.
49 Breach of peace on the part of one individual does not prevent others of that party from the enjoyment of peace; and see under no. 53.
50 Peace between two towns is restricted to the people of that generation.
51 An injured party who retaliates is not held for breach[5] of peace, even though there be added the phrase: 'while the pact remains inviolate', or the words: 'the penalty to be incurred as often as'.
52 The above phrases work only to the disadvantage of the aggressor. However, see some arguments here to the contrary.

[1] [Reading doubtful. Transpose *amissa* and *cum*.—Tr.]
[2] [*pōt*, i.e. *potest*.—Tr.]
[3] [*tn̄*, i.e. *tamen*.—Tr.]
[4] [See, however, the text here.—Tr.]
[5] [For *facta* read *fracta*.—Tr.]

53 Adultery violates peace, if the phrasing is general.

54 Whether, if peace proceeds[1] from statute, it is necessary to secure peace at the hands of all the heirs.

55 How the fine agreed upon is distributed.

56 Whether a guardian makes peace for a ward.

57 Whether a son, not the heir, may make peace that will avail under a statute which remits the penalty, if peace is secured at the hands of the heir.

58 A daughter is able to make peace; and see under no. 64.

59 [**126**] A father can make peace for injury done to a son.

60 On the other hand, whether a son may make peace for injury done to his father, the latter being yet alive.

61 The abbot makes peace for injury done to a monk.

62 The bishop makes peace for an injured member of the clergy.

63 Whether syndics make peace for injury to a state.

64 Whether a bastard prosecutes, and even makes peace, for the murder of his father.

65 Whether peace can be made on such terms that the offending party surrenders himself to the injured person at his discretion.

66 What the nature of the discretion and the punishment should be in this case.

67 One who throws himself upon the generosity of another may not suffer bodily injury;

68 Likewise, if he puts himself at another's disposition;

69 Otherwise he should be restored to his earlier status.

70 Discretion assumes the standard of judgement of a good man.

71 Parties may be compelled to make peace.

72 The Pope forces sovereigns to make peace.

73 Whether amnesty granted to subjects applies also to indirect subjects, i.e. persons who are subject to a vassal of the sovereign.

74 Peace with reinstatement of rebels includes those deceased also.

75 If by treaty the enemy are bound to leave their camp and withdraw from a country, the agreement does not affect those who own property there by personal right.

76 Whether the declaration of a sovereign is to be acted upon to the disadvantage of a third party.

77 Whether a rebel, after suffering confiscation of goods without a trial, may rightly, on the manifesto of his sovereign, recover his property. Here there is a lengthy examination of Decio's *Consilia*, 410 and 544.

78 A condemnatory instrument may not be executed regarding a crime.

79 The affirmation of a ruler is final; with the qualification here.

80 A notorious rebel may be plundered and punished without any formal sentence.

81 The regulations of the *Clementine Constitutions*, II. vii. 1, apply only to the supreme ruler.

82 An imperial vicegerent ranks below the Emperor.

83 A man who secures the property of a rebel may ask that the latter be declared such after due investigation. The other may contest the case, and the arguments of both will be given a hearing.

84 A rebel (even though not openly such) may be killed with impunity[2]; and, after the killing, its justification or non-justification will be taken up.

85 Whether agreements not to receive exiles are limited to the time being, or whether they include also exiles of a later date;

86 Likewise, whether they include an exile who is reinstated and then banished again.

87 Property alienated with consent of the creditor and then recovered does not return to the mortgaged state, even though it is again going to be used as a security. And the reason is here stated.

88 A person who absents himself with permission of the creditor, on his return falls again under the obligation not to leave.

89 [**126′**] The words 'I entrust' give into custody.

[1] [Reading *prodit* for *prodest*.—Ed.]

[2] [For *impunèo ccidi* read *impunè occidi*.—Ed.]

90 A custodian performs the acts which are essential to custody.
91 Whether the custodian of a stronghold has judicial and executive powers.
92 A captain of the guard is allowed the right of moderate punishment. But more serious cases he refers to his superior.
93 To what extent the custodian of a lost stronghold is liable.
94 A custodian should not cease to be what he is.
95 In the case of the Emperor all punishments are discretionary.
96 Sleep does not excuse at times even from the death penalty.
97 A hired custodian is liable even for loss that is unavoidable.
98 A custodian substituting another who loses the post is excused if he has substituted a noble; not otherwise.
99 Watchfulness is a poor protection against overwhelming force.
100 When fault precedes disaster, the latter is not excused.[1]
101 A custodian is not under obligation to effect the impossible; and see no. 102, at the end, and no. 109.
102 A custodian is held liable even in the face of overwhelming force, when he has accepted a post to be guarded in time of war.
103 A hired custodian is held liable for unavoidable[2] losses.
104 The custodian even of a seized stronghold should restore it to the person from whom he received it and not to the actual owner, even the Pope's orders notwithstanding.
105 Those who surrender strongholds, even when they are not able to make resistance, do wrong to accept money.
106 A commander of a stronghold should not even parley about surrender.
107 The bondsman of a commander of a stronghold is liable *ad quanti interest*, but not for the fine agreed upon in the bond.
108 Likewise he is not liable, if the commander has betrayed the post;—at any rate not to corporal punishment.[3]
109 A garrison commander who allows the enemy to plunder when he could prevent it is heavily punished.
110 Castle commanders should not flee at the sound of the trumpet.
111 After peace is made, one party kills a man of the other, and pillages his home. Is the penalty agreed upon twice incurred? Observe a distinction.
112 Peace is a unity;—not a separate peace for each person.
113 Theft is not consummated upon an inheritance that is not yet taken up.
114 An inheritance not yet taken up is exposed to violence and underhand practice, though not to theft.
115 Under the Aquilian Law also action is granted for loss inflicted before an inheritance is taken up.
116 Reason why action for theft is not given,[4] even after the inheritance is taken up. A new explanation[5] given here, in addition to others.
117 New interpretation of *Digest*, XLI. iii. 35.
118 Whether a person who is liable to the penalty for breaking a peace is liable also to penalty as an accessory.
119 An individual cannot be both principal and accessory to the same act.
120 When several wrongs coalesce.
121 A person giving aid to two is liable only for helping one.
122 [**127**] Ignorance at times excuses crime.
123 When purpose and intent are considered in extenuating wrongs.
124 Injury should be given[6] immediate cognizance.
125 Injury is assumed to have been forgiven, if signs of amity follow.
126 What the signs of reconciliation are.
127 Whether penitential confession is evidence of forgiveness of injury.
128 Duelling is frowned on by the law.
129 Duelling is a madness at variance with all humanity.

[1] [Reading doubtful. See the text under this number.—Tr.]
[2] [*fatalibu.*, i.e. *fatalibus*.—Tr.]
[3] [Before *corporalem* insert *ad* [*poenam*].—Tr.]
[4] [For *datur* read *detur*.—Tr.]
[5] [Insert *novus intellectus*.—Tr.]
[6] [For *revocare* read *revocari*.—Tr.]

130 The duel should be the last recourse.
131 General usage condones duelling.
132 Duelling even to vindicate innocence is odious to the laws.
133 Custom does not excuse duellists.
134 Evidences of reconciliation should be definite and conclusive.
135 Doubtful evidence is not sufficient.
136 *Digest*, XXVIII. ii. 23, interpreted otherwise than by other Doctors.
137 Adoption of one's own son, who has been emancipated and disinherited, does not cancel the disinheritance. See explanation here.

I ASK, further: When peace has been made between the chief 1
sponsors of a war (e.g. between the very powerful kings of Spain and France), does this include their subjects, adherents, friends, and allies? And that it does not include allies is the comment of Geminianus and de Franchis;[a] and with this Panormitanus[b] agrees. Alexander[c] takes the other view, and cites *Decretals*, I. v. 1; so Innocent and Giovanni d'Andrea on *Sext*, II. xiv. 2.[1]

Angelus,[d] however, makes a distinction: Either the terms of peace are drawn up in the abstract, and adherents are included; or they are drawn up with reference to individuals, and then adherents are not included (particularly if a provision is added of such a character as not to allow of extension)—unless in this last case the interests of the principal cannot be conserved without including them.

Moreover, Baldus,[e] too, says that peace is a matter of strict law, 2
like the contract covering agreement; and so he argues that what is omitted ought to be treated as omitted. Therefore it is the safer plan to have precise terms, [127′] and to make definite and specific mention of adherents. This was stated by Angelus,[f] and it is implied in the remarks of Innocent on *Decretals* I. v. 1, as Panormitanus there records, lauding the good faith of the Apostolic See, which is not in the habit of making peace, or negotiating it, without including its adherents. And he there assumes that those do wrong and act in bad faith who do not include them.

Yet in the year 1544 we witnessed a peace made between the Emperor Charles and Francis, King of France, in which there was no mention of Henry, King of England, then an ally of Charles. But as the Emperor was a man of steadfast honour, we must assume that this was done with Henry's consent. Or, perhaps, each of the kings was a principal in the war, and each at his own charges had declared war upon France. And see what I have said above in Part II, chap. xi, no. 3.

And, in view of what I have just set down, there is grave doubt as 3
to the correctness of the statement of Baldus on *Code* III. xxxiv. 2,[g] where he concludes that when war is declared upon a sovereign, it is counted as declared also against all his associates and helpers (this he

[a] *On Sex* II. iv. 2, at the beginning.
[b] *On Decretals* I. v. 1, col. 8, the words *ex praedictis*. In first *addit.* to Bartolus, *on Dig.* XIII. vii. 18, § 1, at end.
[c] *On Dig.* VI. i. 43.
[d] *Consilia*, Bk. II. 195, col. 4, the words *sed ut dictum est*.
[e] *On Dig.* VI. i. 43.
[f] Col. 13, the words *et no. quod quando aliquis diffidatur*.

[1] [Pope Innocent IV is the author of this canon, '*dat. Lugd. XVI. Kal. Aug. A. III.* (1245)' (Note to Richter-Friedberg edition of the *Decretalium Collectiones*, Leipzig, 1881.) The collection known as *Liber Sextus Decretalium*, here referred to as *Sext*, was not made until 1298, during the reign of Boniface VIII.—ED.]

states without comment as is his wont, and he is followed by Jacobinus de Sancto-Georgio[a]). For since they are not included in a peace (which
4 is a favourable category, and subject to generous interpretation), much less will an unfavourable action be extended so as to include them.

Perhaps it would not be without point to distinguish between:

(1) The adherents of whom Felinus speaks,[b] i.e. those who assist the principal with service, counsel, and goodwill, e.g. his retainers and servants, in whose case the very etymology and content of the names used to designate them look to their adherence to the principal, and to their support, as it were, and their sustenance through him. (Here applies the saying: 'But it is good for me to adhere (*adhaerere*) to [my] God';[c] and again: 'My soul hath stuck close (*adhaesit*) to thee'.[d]) And it is reasonable to say that such are included both in war and in peace.
5 And perhaps the same could be said of permanent allies and adherents —of whom there is mention in a passage in *Digest*, XLIX. xv. 7, e.g. those who give allegiance for their fiefs to greater lords or rulers. For although they do not thus become subjects and vassals of the latter, they lack little of it. And:

(2) The adherents who are equal at least in point of standing and independence.[1] These I should think are not included, and that special mention of them is required. Such is the implication of *Digest*, XLVII. x. 15, § 26. And when there are many equally responsible, even though one is exempted, another is not cleared. Cf. also *Digest*, XLV. ii. 19.

This last-mentioned law is applied by Bartolus[e] to a similar question concerning several persons who have made peace in company, agreeing under penalty to give no [128] offence. If the penalty has been incurred through the act of a single individual, does it fall upon all the persons in that group? This question is discussed again by Bartolus;[f]
6 and in regard to it I shall speak later.

Who are classed as adherents is explained by Angelus, and he mentions also[g] followers, helpers, connexions, and captains. There are exemptions also. On this see Felinus,[h] who, citing Angelus, says that adherents are subjects (which must be understood as bringing them within the first category above described by me).

Elsewhere[i] Felinus speaks again of adherents, saying that a person who makes peace should bind himself for his retainers, associates, adherents, and the like. So Baldus,[j] too. Bartolus[k] declared also that if peace is made for assistants and helpers, it will include sons, grandsons, and relatives, and also advisers and servants. Hence Baldus[l] adds that if injury is done to an individual, it is reckoned as done to the whole family and household.

7 But to get a clearer notion of this matter of adherence, it should be observed, in the first place, that normally this sort of allegiance

[1] [For *libertatem* read *libertate*.—Tr.

[a] *Investitura, tit. De Adhaerentibus*, no. 14.
[b] On Rubric, *Decretals*, I. xxxiv, no. 11.
[c] [*Psalms*, lxxii. 28. (Douay version)].
[d] [*Psalms*, lxii. 9. (Douay version)].
[e] q. 2.
[f] *On Authentica* following *Code*, VIII. xxxix. 2 (*Haec ita*), qu. 13.
[g] *On Authentica* 1, at the beginning, col. 2, the words *ex hoc no.*
[h] *On Decretals* II. xiii. 12, el. 2, col. 2, at end, the words *no. ibi in eos adhaerentes de causa.*
[i] On Rubric, *Decretals*, I. xxxiv, declar. 5.
[j] *Ibid.*, on *Code* I. iii. 1, no. 6 (*operatur*).
[k] *On Code* V. ii. 1.
[l] *On Code* IX. xiii. 1, not. 5.

establishes no jurisdiction on the part of the person to whom one gives adherence. So Baldus[a] and Andreas Siculus (called Barbazza),[b] who says 8
that people are not under the jurisdiction of the person to whom they give adherence, but under his protection. He cites a passage in which this 9
is clearly shown;[c] and he states that the lord must protect adherents with force of arms, if need be. So Bartolus;[d1] but understand this with the proviso: if they are unjustly[2] attacked—according to a gloss[e] and Barbazza.[f]

The latter here makes another noteworthy remark, namely that, 10
in case of doubt, it is assumed that a man giving adherence has reserved the rights of his lord and superior. This Barbazza had already said,[g] and farther down he repeats.[h]

Moreover, Baldus says[i] that if it is shown that an ally or adherent elects to become a subject, he compromises himself. Yet Baldus recognizes a distinction: Either such a subjection approximates an innominate contract, and then there will be no opportunity to withdraw; or it is made simply, or as a simple prorogation, and then the case is otherwise. You may consult him at greater length.[j]

Again, Brunus[k] stated that a vassal of the Emperor, even without 11
the latter's sanction, may give adherence and enter into a league or alliance with some king, in case he has powerful neighbours against whom he cannot hold his own and the Emperor is far away [128′] and unable conveniently to protect him. Brunus cites Bartolus[l] and Baldus,[m] and adds, too, that such alliance does not entail jurisdiction or subjection.

He says here also that if one adherent drives out another, the sovereign may take a hand in the matter (but in a friendly way) and restore and protect the persons expelled—even to the point of using armed force. For this he cites Raimondi.[n]

And he adds, finally, that if a person allied does not call upon another ally for protection during a thousand years (because no emergency has arisen), the claim has not for that reason lapsed.

Barbazza[o] says, again, that if a man gives adherence to an enemy of 12
his lord, in point of law he forfeits his fief, because by reason of that very act he is assumed to have become a traitor. And he declared also that this is true, even though the hostility up to that time was covered and hidden, but yet on the verge of breaking out. He cites Baldus;[p] and you will find the matter treated in full by Curtius.[q]

Socini,[r] too, said that if a man has given adherence to an enemy 13
of his lord and caused the enemy's insignia and arms to be blazoned upon his castle, he should be deprived of his fief.

Bartolus[s] may be consulted on the question whether, when peace 14
has been made between private parties, it is to be held that the peace has been broken by the masters, if servants of the two parties get into

[a] *Consilia*, Bk. V, 506 (*In tres marchiones*).
[b] *Consilia*, Bk. II, 11 (*Illud afferam in medium*), under no. 31, at end.
[c] *Decretals*, V. xxxiii. 8.
[d] *On Dig.*, *Prima Const.*, at the beginning, no. 7.
[e] *On Decretals*, V. xxxiii. 8.
[f] *Consilia*, Bk. II, 11, no. 22, near middle.
[g] Under no. 15.
[h] No. 35, at end, and under no. 42, the words *stat ergo vera conclusio*.
[i] *Consilium* 506, above cited.
[j] *Ibid.*, at end.
[k] *Consilium* 86 (*Dubitabitur an regis maiestas*).
[l] *On Extravagans: Qui sint rebelles.*
[m] *On Decretals*, II. i. 1.
[n] *On Dig.* XLIX. xvi. 5.
[o] *Consilium* 11 (above cited), no. 19.
[p] *On Feuds*, Bk. I. v, chap. i.
[q] *Tractatus Feudorum*, 4th main div., qu. 15.
[r] *Consilia*, Bk. III, 87, under no. 21.
[s] *On Dig.* XXXIX. iv. 1, § 5; and on XLVII. ix. 7.

[1] [For *Bal.* read *Bar.*—Tr.
[2] [For *iniusti* read *iniuste.*—Tr.]

a broil. And I think that a distinction should be made: Either the servant offends in connexion with business put into his hands by his master, and then he involves the latter; or he offends in connexion with extraneous activities and does not involve the master.

In such a case, however, I should think that the master was bound, by virtue of the peace pact, to deliver up the servant for judgement. So Bartolus,[a] who says that the master by producing the servant clears himself. Otherwise, I think, he would hardly be exonerated, unless he were to demonstrate that a new occasion for quarrel had arisen—a point which I shall treat at greater length later.

[a] *On Dig.* XLVIII. xi. 1.

Though Baldus[b] claims that it is not taken for granted[1] that an act is committed with the knowledge of the master, yet in view of the agreement as to penalty which is usually attached to a peace pact, I should hold that, on general principles, the master is liable to the penalty.

[b] *On Code* II xix. 6.

15 To touch on the point in passing, it makes a great difference whether a person participated in an act in the character of leader (or captain, as they say), or merely as an attendant (or follower) and adherent;—especially when loss has been wrongfully inflicted upon some one, and the matter therefore has come up for settlement. For the person who participated as a follower is liable for his own action only; but he who has gathered and called together others is liable in full, and for the acts of all. So Bartolus;[c] and he makes application to the case of a certain Count Albert, who gave assistance to exiles from Bologna.

[c] *On Dig.* XLVII. viii. 2, § 12.

Baldus,[d] too, makes mention of this [**129**] count, arguing, however, that he will be liable for the acts of all those whom he brought with him. Thus you see that, from different points of view, one and the same person may be regarded as a principal and as a follower. Alexander,[e] too, treats this subject at length—setting forth also the nature of the office of 'captain', and the extent of its responsibility.

[d] *On Code* VI. i. 1, col. 4, the words *sed quaero qui dicatur principalis.*

[e] *Consilia,* Bk. I, 103.

Principals are liable also in another way. For if any loss befalls those whom they have called together, they must make this good, unless the project was unlawful, as I have already pointed out in another passage. So Bartolus.[f] This topic is fully treated by Antonius de Butrio,[g] who adds that in the case even of those summoned to a just war, losses are not made good to them by the person who raises the standard, provided that they have followed him voluntarily (e.g. from a feeling of duty, from courtesy, or because of kinship)—i.e. if they have not followed him as a matter of obligation, being bound thereto.

[f] *On Code* IX. xii. 6.

[g] *On Decretals* II. xiii. 12, el. 1, col. 6, the words *venio ad sextum quaesitum.*

16 And here Antonius[h] adds one detail which to the uninitiated and unlearned will seem unjust, namely that if I have loaned a horse or anything else to a person setting out to battle or to some other venture, he is not bound to reimburse me, in case he loses it; for it belongs to the

[h] *Ibid.*

[1] [*presumitur*, i.e. *praesumitur*.—Tr.]

nature of this contract that an accident happening to the thing loaned without any fault of the borrower is set down to the loss of the lender, whose business it was to take into account the possibility of this happening.

In my own case, however, after I borrowed[1] a horse thus from a friend, and on its return journey[2] it was captured by the enemy from a servant of the lender, whom he had sent along with me to bring the horse home, I paid him the price, not wishing to give an occasion for criticism, and because, as the Apostle says, many things are lawful which yet are not expedient.[a] But any one wishing to take advantage of the law is guilty of no wrong.

[a] [*1 Corinthians*, vi. 12.]

As for the above quotation from Baldus, to the effect that a peace made for one's self, adherents, and assistants includes also connexions and relatives, he seems to be in opposition to Bartolus and many others. For Bartolus[b] states that a man who injures the brother of the person with whom he has made peace is not liable to the penalty for violation or infraction of that peace.

[b] *On Dig.* XLV. i. 126, § 2.

We must distinguish, however, according as the peace agreement was drawn up in broad or in specific terms. If it is specific and direct, it includes no others than the contracting parties; and the verdict of Bartolus will hold—unless it should be shown that the brother was injured as a result of the original quarrel (this particular is touched upon by Alexander and others[c], and I shall take it up later in its place). But in the previous case, i.e. if the phrasing is broad in scope, the other view holds.

[c] *Ibid.*

Those who wish to learn more about adherents should consult Jacobinus de Sancto-Georgio,[d] who, among the items culled from the writings of others, treats of a point which I have decided to sift thoroughly in the next following question; for it is pertinent to these war-like times of ours, and, moreover, it is of frequent occurrence. For many men (either with the idea of increasing their wealth, or of keeping safe at home and looking after their interests), though they are of the masculine gender (to use a grammatical turn), have chosen to be epicene.[3]

[d] *De Adhaerentibus.*

[129′] My question, then,[4] concerns a certain nobleman who in point 17 of residence, bodily presence, and feudal oath was on the side of the Emperor, but in the fashion of colluders helped the enemy to the extent of his ability with advice, information,[5] and warnings.

These colluders side with both parties (or rather with the enemy, as is stated in *Digest*, XLVII. xv. 1), and betraying the cause of their friends, help the opposing party;[e] of these it is said 'though in the

[e] *Dig.* III. ii. 4, § 4.

[1] [For *commodato* read *commodatum*.—Tr.]

[2] [For *regressum* read *regressu*.—Tr.]

[3] [i.e. their loyalty is divided.—Tr.]

[4] [The translation is somewhat free in this and the following paragraph, in consequence of Belli's style, of which the passage in question is an extreme example. A literal translation would result in the interposition of the two digressions (upon 'colluders', and upon the meaning of the word 'noble') between the subject ('A certain nobleman') and the predicate ('helped the enemy').—Ed.]

[5] [*rellatione*, i.e. *relatione*.—Tr.]

body they seem to be with us, yet in intent and purpose they are against us',[a] and they are much worse enemies than those outside. There is a reference to them also in [Gratian's comment, Pars III, § 11 in] *Decretum*, II. xiii. 1. 1: 'Like a mouse in the wallet, a serpent in the bosom, or fire in the lap they requite those who shelter them.' For it means nothing to be at home in the body, if in spirit a person is estranged, and an outsider or enemy.[b] Such persons Baldus[c] calls traitors, saying: 'a revealer of secrets is a traitor.' And *Digest*, III. ii. 4. § 5 shows also that they are under a stigma. Further, Bartolus[d] calls them oath-breakers and rebels. And this is so manifest that I think that they cannot find excuse in the court of their own conscience.

[a] can. 1, *Dist.* 3.[1]

[b] See *Dig.* XLIX. xv. 26.

[c] *On Feuds* Bk. I, 5, chap. i, col. 6, the words *de proditore.*

[d] Tract. *Qui Sint Rebelles*, the words *rebellis, quaedam est infidelitas*, and *item no.*

The above-mentioned noble, I say (I mean really a noble, and a prominent man—for there is also a less favourable interpretation of such
18 a word; so Catullus:[e] 'What would you?[2] Must you have notice[3] at any cost?')—This man, then, during the progress of a war, helped the enemy; and when, after the conclusion of peace, his guilt was discovered, with the idea of escaping prison and the penalty for his wrongdoing, he cited the peace pact, in which was a general provision that pardon be granted to rebels and to the abettors and followers of both parties. Would this plea avail to help him?

[e] [xl. 6.]

Consulted in this case of actual fact, Angelus[f] discusses the question in detail, concluding that the man in question is included in the pact, on the ground that he was really an adherent of the enemy, as shown by his heinous crime in betraying his own country; so also on the basis of many other arguments which he advances.

[f] *Consilium* 257, beginning: *Inter capitula pacis.*

My notion is that, first of all, the articles of the pact should be looked into, as I have already said many times; for they might be drawn[4] upon such broad lines as to cover this case. But otherwise, i.e. where there might be an ambiguity in the terms, I should think that a judge would be safe in not allowing such a crime to go unpunished. For in a doubtful matter, the interpretation is unfavourable to the party who gets into difficulty because of loose phrasing;[g] and again because, when a crime is manifest and inexcusable, even in a matter doubtful in point of law the preferable course is to safeguard the public weal—and this principle can be applied even to punishments, according to Dynus.[h]

[g] According to the familiar *Dig.* II. xiv. 39; and XVIII. i. 12.

[h] *On Sext.* V, Rule xv.

Such crimes, therefore, should be avoided by all men, and especially by nobles (whose standards should be higher and holier), [130] lest they imperil their whole property, their reputation, their lives, and in fine their very souls. For such action is not lawful in the sight of God, nor unpunished in the courts of men. In fact they should

[1] [False reference, due to corruption of the text (another reading is: *in c.* 1. iii. *dist.*). See *Decretum*, I. xciii. 1.—Tr.]

[2] [For *est* read *vis*.—Tr.]

[3] [The point is that *nobilis, notabilis*, and *notus* are of the same stem as *nosco* ('I come to know'), the neutral meaning developing different shades.—Tr.]

[4] [For *conceptas* read *concepta*.—Tr.]

avoid it because it brings disgrace upon their offspring and the entire agnatic group; for in them, too, a recrudescence of the father's crimes is feared, and they are regarded as persons deserving to perish by the punishment meted out to the father.[a]

[a] *Code*, IX. viii. 5, § 1.

(And lest we suppose that this is a case where imperial power wished to secure itself by severity of punishment, Cicero[b] himself declares that the principle[1] was introduced on valid grounds. 'Laudably', says he, 'was this provided by law, with intent that affection for their children might render parents more considerate towards the state.')

[b] *Letters to Brutus*, I. xii. 2.

Next I raise the question whether it is permissible for a commanding general, whom to-day they call 'captain general', to make a peace. And already I have given the answer above, in pointing out a distinction as to the powers of this officer in the making of truces. Assume then, as there, that if he is not himself the sovereign, or does not hold a special commission from the latter, he cannot make peace; for this power is not conferred by a general commission.[c] Such is the view, for example, of Bartolus, Angelus, and others.[d] 19

[c] *Dig.* III. iii. 60.
[d] *On Dig.* II. xiv. 5.

Again, I raise the question whether a sovereign or a free state may make peace and, by its terms, remit payment for losses inflicted upon its own citizens and subjects. Baldus[e] cites Hostiensis[f] as saying that this is not permissible, unless the populace and those who have suffered the loss give their consent, and Panormitanus,[g] too, seems to agree; but, although this is generally true, there is exception if the sovereign takes such action for reasons that concern the public weal, e.g. in the present case, when he so acts in order to secure the blessing of peace. Decio[h] warns that the above must not be forgotten, citing many passages in its confirmation, and declaring that it is the commonly accepted view, from which no one dissents. 20

[e] *On Dig.* VIII. ii. 21.
[f] *Summa.*
[g] *On Decretals*, II. xxiv. 18.
[h] *Consilium* 520, nos. 4 and ff.

But Joannes Lupus[i] states that if peace cannot be made on other terms, the populace must acquiesce in the action of a ruler who remits losses; for, although he thereby acts much to the disadvantage of his subjects, on the other hand he benefits them largely in securing peace for them. This fits well enough with the views of others; there remains, accordingly, only the question of intent. And this is resolved on the basis of the terms of the pact.

[i] *De Bello et Bellatoribus*, § *Rogo*.

But is the person who caused the loss secure in his conscience and in the eyes of God on the basis of this kind of remission and the terms of a compact?—and I am speaking as much of the sovereign who declared the war, as of his soldiers. And whether a person engages in war unjustly, or whether with justice he defends himself against unjust attack, the Doctors conclude that such persons are not secure. This was the view of the above-mentioned Joannes Lupus,[j] and it is more clearly expressed by Angelus de Clavasio,[k] who holds that a ruler 21 22

[j] *Ibid.*
[k] *Summa*, the word *bellum*, § 14.

[1] [Speaking of making the children of an outlawed person share his fate.—Tr.]

waging an unjust war may not remit[1] losses, even those of his own subjects. (This bears on the preceding question. For the humble subjects [**130′**] are not at fault, even though the war is unjust; for they are led like sheep by a shepherd, whithersoever their rulers and officers desire.)

And this is not at variance with my earlier statement to the effect that, if a war is just, it is permissible to plunder the subjects of the other party. For though that may excuse an enemy, on the ground that his cause is just (as in the case there), it does not excuse the ruler who makes resistance unjustly and brings loss upon his subjects (as is the case here).

Much less, therefore, will he be free from responsibility for losses inflicted by his soldiers upon the opposing party, whatever may be said in the compact and terms of the peace.

And here applies a remark of Barbazza,[a] who cites Petrus de Ancharano,[b] to the effect that even though states by compact have agreed that reparation be not made for the plundering on either side, the plunderers will nevertheless not be safe on the score of conscience; in fact, as he says, the owner of the stolen property may sue for it, the pact notwithstanding.

[a] *Consilia*, Bk. I, 38, col. 3.
[b] *On Sext* II. xiv. 2; and *On Sext* V, Rule v.

This, perhaps, will need to be limited to the case I shall soon take up.[c] Or perhaps we could say simply that, even a pact notwithstanding, when dealing with a question of wrongdoing, recourse may be had to an ecclesiastical judge—falling back on the well-known admonition of the Gospel,[d] on which the Canonists discourse at length.[e]

[c] § beginning: 'Again, de Afflictis' [*post*, p. 298].
[d] [*St. Matthew*, xviii. 17][2]
[e] *On Decretals* II. i. 13.

But as for the ruler whose cause in the war is just, Angelus says that if he cannot otherwise secure peace, unless he remits offences and loses, he is excused in the sight of God if he inflicts loss on his own people—because he is forced so to do.

However, as I have indicated, in the sight of God this pact will not excuse the ruler of the other party, nor yet his followers; for a sovereign cannot without good reason set aside the mandates of divine law, as it is written: 'Thou shalt not steal'—which certainly covers plundering (which is barefaced robbery) and all unlawful seizure.[f]

[f] *Summa* [of Angelus de Clavasio], the word *furtum*, § 34.

Sovereigns, therefore, should be wary of undertaking war on insufficient or[3] unjust grounds. For though[4] they may be secure in point of law, they are, however, not free from responsibility in the sight of God. And though they often have at their side evil advisers, ecclesiastical as well as lay (who, either to curry favour or through fear, frame all their speeches to suit them, and manufacture and seek out justifications for their party, so that it may appear that their cause is righteous—of whom it may truly be said 'seeking excuses for sins'), good kings and

[1] [For *temittere* read *remittere*.—Tr.]
[2] ['Tell it unto the church'.—Tr.]
[3] [For *ne ve* read *neve*.—Tr.]
[4] [For *Et si* read *Etsi*.—Tr.]

sovereigns should bring their insight and wisdom to bear, examining their own hearts. For therein they will discover right counsels and truth and just judgement as to war.

Soldiers, too, should be wary, especially volunteers, who are serving simply for the compensation. For they will have no excuse in the sight of God for losses which they inflict upon the people, either of their own party,[1] or even those of the enemy, [131] as I have noted above.[a]

[a] Part II, chap. ii, no. 4.

Again, de Afflictis made a remark on the matter of remission of losses which we should not pass over in silence, namely that the conclusion above reached is valid in the case of a peace of general scope which is made with an adversary independent and free; but not so, if it is made with a subject—e.g. if the King of France were at war with the Duke of Bourbon. For in this case the King would not be able in the peace pact to excuse the Duke and his followers for losses which had been inflicted upon the subjects of the King—unless the King were willing to reimburse them out of his own treasury. So de Afflictis.[b]

[b] *On Feuds* Bk. II. 51, chap. i, § 6, no. 25.

And perhaps the most plausible explanation of the rule lies in this, that while the King probably could force a vassal of his to sustain those losses, there underlies no consideration of the public weal which favours the condoning of the damage inflicted. Moreover, perhaps in this case, too (as in another previously discussed), it would need to be determined whether or not the King could conveniently achieve peace without the remission. But de Afflictis simply makes the bare statement, and mentions none of these considerations. He cites also certain *Consilia* of Alexander, which I cannot locate, perhaps because my copy of that text is defective.

Finally, on this subject of restoring things stolen, another point mentioned by Baldus[c] should be noted, namely that states which in time 23
of war occupy strongholds that they afterward refuse to restore except on payment of money, do wrong in extorting this price; and they may be sued for the money, notwithstanding the terms of the peace that has ensued. (I understand this to be a reference to strongholds taken from others than[2] the enemy. For if things are taken from the enemy (assuming the justice of the war), it is allowable to retain them by law of every kind—as well by divine law as by the law of nations, as was noted above in its place.) And Baldus here adds that the same rule holds for the brigands and robbers, whom he[3] calls ruffians, who refuse to restore plunder except for ransom.

[c] *On Code* IV. vii. 7.

Again, in regard to foragers (i.e. soldiers' servants), who seize and 24
steal the cattle of other people,[4] which a third party takes away from

[1] [For *partis. Sive* read *partis, sive.*—Tr.]
[2] [For *captis aliisquam* read *captis ab aliis quam.*—Tr.]
[3] [For *ipsi* read *ipse.*—Tr.]
[4] [For *alieno* read *alienos.*—Tr.]

them, he declares that, even though the final captors are enemies, the foragers are none the less bound to make good the loss to the original owner; and that they can be punished for theft and cattle-stealing.[1]

This applies in general to soldiers too. For they ought not to turn their attack from the enemy upon their own people, as is said in *Code*, IV. lxv. 35, at the beginning. But in our times this happens with great frequency and without punishment.

In regard to my statement just above that strongholds which are occupied must be restored to their owners without a ransom, understand this to apply even though[2] a sovereign or a state has incurred great expense in the way of intrenchment—which surely a ruler has the right[3] to do, both with respect to a feudal holding upon which he has a direct claim, and also in respect to one that is fully under a subject's control. See the passage in *Digest*, VII. viii. 16, § 1, where [131] Albericus comments; so Baldus on the *Feudorum Libri*, II. viii, chap. i, § 2, where he says that in such cases the lord will look after the defences of the stronghold, without expelling the vassal or harbouring any ulterior motive; which is to say that no 'necessity' will be pretended, if there really is none, and that occasion will not be seized upon as an excuse—as is sometimes done by the agents of sovereigns.

Baldus reverts again[a] to this topic, saying that the lord exacts no payment from the owner of the property or the vassal for the reason that the expense was incurred at his own instance, and for the advancement of the common welfare. (And it should not cause surprise that a stronghold or any other property of a private individual may be occupied and fortified with an eye to the public good; for this is possible even in the case of a church, according to Petrus Bellapertica and Cino, as reported by Baldus.[b] This point I have already considered more at length in its place.)

[a] *On Dig.* I. xvi. 7, the words *extra quaero.*

[b] *On Code* I. i. 2.

[25] We should note another point which has a direct bearing upon the decision reached above, namely that losses may be remitted by treaty; for though peace has been made and the injuries and claims are mutually cancelled, with a formal covenant not to make further demands, still a stronghold unlawfully occupied may be reclaimed, because the pact here mentioned does not cover the reclamation of property. So Alexander.[c]

[c] *Consilia*, Bk. II, 168 (*Requisitus ut breviter dicam*).

Note, moreover, that the reference is to a stronghold unlawfully occupied before the war. For if it had been occupied during a war between parties who had the right to make war and who had engaged therein justly, I should think that the stronghold could not be reclaimed, in view both of the law of nations and of war, and also of the peace pact. For the latter, if it does not exclude, at any rate does

[1] [For *abiegatu* read *abigeatu*.—Tr.] [2] [*ēt si*, i.e. *etiamsi*.—Tr.] [3] [*pōt*, i.e. *potest*.—Tr.]

not include such reclamation, unless it was the stronghold of a private person that had been seized, let us say because he belonged to the other party (as often happens in these wars of ours); for then Alexander's statement would unquestionably hold. (On this also there is discussion above in another passage.)

Next I raise the question whether, after peace has been made, it 26
is permissible for a ruler to build forts and to entrench points which he holds on the borders and confines of the other party with whom the peace was made—but on his side of the line. And Bartolus[a] seems to hold for the negative; but he appears to be speaking of a case where this prohibition was incorporated in the peace pact; and under these conditions there is no room for doubt.

[a] *On Code*, Rubr. XII. xl.

Baldus, however, who leaves no point untouched, considers this question at length in a *Consilium* already twice cited above.[b] A peace had been made between the Duke of Milan and the Dukes of Ferrara and Mantua, wherein it was provided that neither party should aid[1] outsiders to cross the river by building bridges and supplying arms, horses, provisions, and other things of that sort. Now a citizen of Mantua or Ferrara had built a bridge over the Po, and a citizen of Milan was diverting its waters and constructing a sort of redoubt. Baldus raises the question[c] whether either of these men may be said to have violated the agreement, and which one of them. According to his wont he argues with acumen, and makes many a nice point regarding this matter.

[b] Bk. II, 195 (*Laudare vos*).

[c] *Ibid.*

His conclusion is that [**132**] it was right to build and entrench the fort, and to divert the stream. And he remarks that such we see to be the common practice; e.g. the King of France builds forts along the confines of the King of England, and the King of England in turn does the same. (For in those days the King of England held on the Continent and on this side of the water both provinces and cities, which in course of time have fallen under French dominion; just as the place anciently called Portus Itius[2] (now commonly known as Calais) very lately[3] has reverted to French control.)

And Baldus adds that all the overlords do this, because, he says, it is the right of each to entrench himself on his own ground; and the man will not be counted as doing so out of jealousy, but with a view to his safety and defence. I think, however, that this will be judged according to circumstances, and with regard to the character of the persons and things involved. For if a rather weak and petty prince should fortify some points on the frontier of a more powerful ruler, it would be more likely that he was doing so with the idea of increasing his security than

[1] [For *innaturam* read *iuvaturam*.—Tr.]

[2] [For *Ieius* read *Itius*. Modern scholars question the exact location of *Portus Itius*. It was, however, somewhere in the vicinity of cape Gris Nez, which has been identified with the ancient *Promontorium Itium*.—Ed.]

[3] [January 7, 1558.]

that he designed to be more confident in aggression. And this point I should think ought to be stressed all the more, if he had previously suffered invasion and loss at the hands of that same ruler. For it would be the part of prudence to have regard for future contingencies, and to forecast coming events in the light of the past.

Baldus states, besides, that it is one thing to be in a position to inflict injury, and another actually to perpetrate it; for in the first case there is no breach of the peace;—just as, he says, in a like case a posthumous child does not break a will before his birth, even though he is in a situation to be born; for until potentiality develops into fact it is like a suspensive condition. Indeed, he says, if a man is in the act of injuring, but no injury is actually inflicted, he will not be said to contravene the peace, unless this specification was set down; for, he says, a peace is nothing beyond the exact terms of the peace.

He adds here that there are two kinds of peace, one having to do with the past, the other with future and subsequent conditions; and this latter calls for a continuance of peacefulness, in such wise that there will be no second recourse to arms, in case the injury recurs. But
27 a new circumstance arising, if not connected with the original grounds, does not involve the question of breach of peace; just as a person does not violate an agreement or a verdict, if he proceeds on the basis of newly enacted law; for peace is a matter of strict law. Likewise,
28 peace is not violated by legal controversies, be it a public or a private peace; nor yet is it broken for slight cause or even for disquieting suspicion, unless the latter is substantiated by action.[a]

[a] Cf. *Feuds*, Bk. II. XXIII, chap. i, § *Si quis enim.*

Baldus goes on to say that if a new and unexpected contingency arises which must be met in the interest of the public welfare, it is permissible to meet it, and to apply a remedy; and, nevertheless, on that ground it will not be claimed that the peace is violated, though the action may be out of harmony in its effect, but not in essence.

He adds, again, that a person does not violate a peace who
29 appropriates a gain that was accruing to another from something belonging to himself—particularly if it is not done out of ill will, but for a pressing reason.

[132] He also distinguishes here between the causes that have furnished occasion for war. Thus, if they have arisen from personal injury, the peace is not broken except on the basis of similar offence; for peace and war are complements one of the other. Moreover if injury both to person and to property have preceded, the peace will cover everything; and he who violates it in one point contravenes it as a whole, provided that the act is similar to the others in the past.

Baldus here concludes, finally, that refinements and arguments on these topics are dangerous, and that they are litigious rather than final. And for this reason he urges that all occasion for war be eliminated;

for peace should be without loopholes.[a] Thus he answers the question above[1] propounded.

Add, further, that when by a peace compact strongholds or other places captured in war are to be restored, they ought to be surrendered in good faith, so that the person who recovers them will hold possession in safety and security as respects the individual who previously had occupied them. Hence it would not be permissible for the latter, in the near proximity of that stronghold or post, to establish another fortified position—even on land to which he had a claim. For in such a case he would not be said to have made the restoration in good faith. Thus Bartolus,[b] who is cited and followed by Baldus.[c] Both cite *Decretals*, II. xiii. 19, which is a passage worthy of note in the present connexion, this subject being clearly treated there.

And just as a ruler himself, after making a peace pact, may not 30
construct new strongholds of this sort or retain possession of those already constructed, no more can his successor. So Romanus,[d] who meets the objection which might be raised (namely that, in regard to his own, a person may do as he pleases) by saying that such privilege does not extend to malevolence, which, as he here claims, is taken for granted in case of doubt—unless the strongholds are essential to safety.[e] And Romanus[f] abundantly demonstrates also that the successor is bound to make good the promises of his predecessor.

As to the question whether a ruler, in the interest of peace, may 31
cede a vassal of his to another ruler, let us say to the one with whom he has waged a war, Giovanni Nevizan in the *Consilia* of Brunus[g] says that Azo argued this question in favour of the Duke of Brittany, whom the King of France, in a peace pact with the King of England, had ceded as a vassal to the latter[2]. He reports that Azo held that the king did not have this power; and he says that Igneus supports the same view at greater length[h]. See further there.

However, Socini[i] has something to say for the contrary view (which see); and perhaps, in the matter of a peace pact, his position is the sounder. But normally it is no more permissible for a lord to appoint a new lord for a vassal than for a vassal to exchange his lord; and Paolo di Castro[j] is sponsor for the statement (according to the latest edition) that a king may not give away a state or parts of his realm against the 32
will of the populace, and without consulting the nobles.

But it seems to me there is a vast difference [133] between simple cession and the compacts of peace or even of war—a point which merits very careful consideration; and I am inclined to the view of Socini by a statement of Alexander;[k]—he affirms, I say, that, in

[a] *Consilium* 195 (above cited), at the end.

[b] *On Dig.* XIX. i. 3, § 1.
[c] *On Code* IV. liv. 9, the words *sed pone quidam nobilis.*

[d] *Consilium* 52, qu. *Magnificorum*, past the middle and near end.

[e] *Ibid.*
[f] *Consilium* 116 (*Visis necessariis*), toward end.

[g] *Consilium* 12, col. 21.

[h] *Repetitiones* on *Code* V. xvi. 26.
[i] *Consilia*, Bk. III, 39, last col. but one.
[j] *Consilia*, Bk. I, 70, no. 6.

[k] *Consilia*, Bk. V, 94, beginning: *Visis et saepius recensitis*, last col. but one, the words *praemissis non obstantibus.*

[1] [i.e. under no. 26.—Tr.]
[2] [Treaty of Galêton, May 18, 1200, according to the terms of which, the young Prince Arthur, Duke of Brittany, passed out of the control of Philip II of France, into that of his uncle John, of England.—Ed.]

the interest of peace, a sovereign may[1] deprive a vassal completely of a stronghold and present it to another. This is a much more
33 extreme case; and he here makes many citations in support of his view.

I next raise the question: In view of the fact that it has been said above that peace includes subjects and (according to some) adherents also, particularly if the breadth of the terms allows of this—I raise the question, I say, whether it includes those as well who later become adherents or subjects. For example, the King of Spain and the King of France, after a long and tedious war, came to peace and good will, and ordained that therein be included all their adherents, associates, and friends. After the making of this peace, it happens that the King of Spain declares war, let us say on the people of Lucca or Genoa, who, previous to the peace pact, were not allied with the King of France. But, on the declaration of this war, realizing that they are no match for so powerful a king, they give adherence, or even make themselves and their state subject to the King of France. Will they thereby be benefited[2] in view of that peace pact, inasmuch as therein are included allies, adherents, and subjects?

Barbazza[a] considers this problem, and concludes that the state in question is included in the pact. His strongest point is that every act allows of the explanation and interpretation: 'While conditions thus hold and remain unchanged.' Now, says he, the state of Lucca was independent at the time war was declared against it; accordingly there should not be an extension to cover the situation when now it is no[3] longer *sui iuris*.

[a] *Consilia*, Bk. I. 38, beginning: *Scribitur parali.*, last col. but one.

This Doctor might have supported his position by a striking and memorable case. In ancient times, the Samnites declared war upon the Campanians; and when the resources of the latter failed, and they were on the point of falling into subjection to the Samnites, they sent envoys to Rome to beg for help. The Senate answered that both the Campanians and the Samnites were friends and allies of the Roman people; hence it was not possible for them to help one party against the other. On receiving this reply, the envoys (as previously instructed by their countrymen) made surrender of themselves[4] and their city to the Romans. Whereat the Romans notified the Samnites to desist from war, and to refrain from inflicting injury upon people who had surrendered to them; and when the Samnites did not comply, the Romans declared war upon them, with evil issue for the Samnites; so Livy records.[b]

[b] VII [xxix] ff.

To me the above reasoning of Barbazza seems weak and inconclusive. For my right ought not to be impaired by the action of my enemy, according to the common rule: 'By the action of one party, unfair terms are not imposed upon the other'; and that argument of his

[1] [*pōt.*, i.e. *potest.*—Tr.] [2] [For *iuvabuntur ne* read *iuvabunturne.*—Tr.]
[3] [A negative seems to have fallen out of this clause.—Tr.] [4] [*se se*, i.e. *sese.*—Tr.]

'while conditions thus hold' can be given another turn. For it ought to be understood with reference to the time of the peace pact, when the above-mentioned persons were not subjects or adherents.

Support [133′] for either view is found in the remarks of Baldus[a] on the question whether a commission carries over to future[1] contingencies. And the above problem is considered by Giovanni d'Andrea,[b] for example, who says that if a peace guaranteed by penalty has been made for self and subjects, it covers a town that afterward gives allegiance, citing *Digest*, VIII. ii. 23. But Baldus, on the *Peace of Constance*, § 1, implies the reverse, holding that if, in the territory of one of the states named in that peace pact, another new city were founded, it would not be included in that peace.[c]

Perhaps the following distinction could be made: (1) The city in question gave its adherence, or made its submission, before the event of war, and then it will be included in the pact, on the principle of *Digest*, VIII. ii. 23. For inasmuch as such a city can no longer make war on its own authority, being no longer independent, it is not proper that war should be declared against it either, unless the merits of the case have been looked into by the person who proves to be its lord at the precise time when the declaration of war is under consideration, even though the occasion for declaring war has preceded the surrender (thus distinguishing after the legal fashion, between the time of planning an action, and the time at which it materializes and becomes effective). There is support for this in what I have said above in Part I of this treatise, chapter v. Or:

(2) The submission was made after the event of war; and in this case I should not think that the city was included in the pact, nor that the king who declared the war was under obligation to abandon proceedings[2] under the terms of the peace, inasmuch as the start and the initial action were permissible. For it is clear that at that time the city 34
was not included under the pact; and it is likewise clear that it is the beginning that must be taken into consideration, according to the statement of Baldus on *Digest*, XLVIII. v. 24, § 4. This statement Decio[d] applies to another problem.

But whether it is permissible for one of the kings to accept the surrender of the city, and to defend it against another king with whom he is in alliance, this will be determined, I think, by the justice or injustice of the war being launched. And the incident above cited regarding the action of the Roman people does not constitute law; for that people did many other things which could not well be justified. There is a further bearing upon this matter in what I am about to say under the next query.

I ask, then: If a new occasion arises for making war, should it be 35

[a] *On Dig.* XXXIX. ii. 18, § 5.

[b] *Addit.* to Durandus, *titu. De Treuga et Pace*, rubr.

[c] *On De Pace Constantiae*, § 1, the words *quid autem si quaedam civitas.*

[d] *Consilium* 37, col. 4.

[1] [Omit *ad* before *futuras*.—Tr.]

[2] [*incemptis*, i.e. *inceptis*.—Tr.]

said that peace is violated? Bartolus thought not;[a] and elsewhere[b] he declares that the man who has made a peace and promised to do no injury must be understood to have made the contract with the proviso: 'unless I shall so do with the sanction of law'. Hence he infers that such a person is at liberty to injure the man with whom the peace was contracted, in case the latter should become an exile from his country, and a statute sanctions the infliction of injury upon such exiles, regardless of peace pacts. Under this head there are many exceptions;[c] [**134**] on the main point see Alexander[d] and Romanus.[e]

36 As to the question whether it is permissible to injure a person who is banished after peace has been made with him, Bartolus[f] answers in the affirmative. But this verdict does not find favour with Joannes of Imola,[g] on the score of conscience. I believe, too, that there is injury to reputation, especially if that qualification of banishment was known to the contracting parties; for it is an altogether serious and unseemly thing to fail to keep one's word. On this point Paolo di Castro[h] also agrees.

37 Related to the above verdict is the statement of Bartolus[i] to the effect that peace is not said to be violated, and the penalty for breaking the peace is not incurred, by adultery committed with a married woman or by debauchment of a daughter. So also Alexander stated[j]. But on this see below.[k]

Hence Baldus[l] said that a thing which does not fall within the scope of the war does not enter into the essence of the peace pact. Hence he assumes that if a man has agreed not to injure in person and through his partisans, he is understood to have promised in regard to matters connected with the war that preceded, and not with reference to the personal hostility of individuals. And this he says we must not forget.

38 And note here an important distinction as to the decision in case it is doubtful whether an injury arises[1] from the old grievance, or from a new occasion. For, on the one hand,[2] the nature of this new injury is like that of the original injury in regard to which peace has been made; and then it is assumed to be a result of the old grievance, and, accordingly, the penalty is incurred.

For, says Baldus, if the original grievance led to serious injuries (such as homicides between two families[3]), and peace followed; and then[4] a man of one party, on new provocation, inflicts a slight injury (let us say, a slap), and a relative of the injured person kills the smiter, the necessary inference will be that the latter had not forgotten the original grievance—because the revenge is out of all proportion to the

[a] *On Dig.* XLVIII. xix. 16, § 2.
[b] *On Dig.* XLV. i. 96.
[c] *Addit.* to Bartolus on *Dig.* XLVIII. xix. 16, § 2.
[d] *Consilia*, Bk. I, 19, col. 1 and 2; Bk. IV, 115, no. 4.
[e] *Consilium* 258 (*In casu proposito*); and 183.
[f] *Quaest.* beginning: *Lucanae civitatis statuto.*
[g] *On Dig.* XLV. i. 96, last words.
[h] *On Dig.* XLV. i. 96, last words.
[i] *On Dig.* XLVII. ii. 39.
[j] *Consilia*, Bk. II, 113 (*Viso instrumento trugae*); Bk. IV, 115, no. 5, following Corneo, *Consilia*, Bk. I, 51, no. 4.
[k] Under no. 52, near end.
[l] *On Code* IV lviii. 5, last col.

[1] [For *praecesserit* read *processerit.*—Tr.]
[2] [The contrasted case is noted under no. 42, beyond the middle.—Tr.]
[3] [For *familias* read *familias.*—Tr.]
[4] [For *ex inde* read *exinde.*—Tr.]

new injury. Therefore, the penalty for breaking the peace will be entered against the slayer. This judgement is reported and highly praised by Alexander,[a] who says that he rendered this opinion at Cesena.

[a] *On Dig.* XXIV. iii. 26, col. 1.

I believe that Baldus was right. For if an injury is so slight that in the case of another offender it would probably have been disregarded and tolerated, or at any rate far less severely avenged, we shall have to assume that the slayer seized upon an occasion for an excuse, and was avenging old grievances. But I do not like the illustration of a slap; for 39
that is a much more serious affront than Baldus assumes, especially among dignified persons and soldiers. For there is no one of them who would not prefer in a quarrel to suffer a serious wound than a slap from the hand. In fact, in this connexion I have witnessed the greatest concern among noblemen, when it was a question [**134**] of making peace regarding the delivery of a buffet. For far more tokens of amendment and regret were demanded from the offending party, than in cases where wounds had been inflicted.

[b] *On Code* IV. lviii. 5.

There is another noteworthy case discussed by Baldus.[b] For suppose, says he, that by statute it is provided that if I injure a man who has injured me or an agnate of mine even to the fourth degree, one-half of the penalty is remitted; but that he who has wounded a relative of some one who has injured him, shall have his hand cut off.

Suppose now that Anthony injures me, and Philip, the brother of Anthony, injures my brother John, and John then wounds Anthony. Surely it might be thought that the wound inflicted by John was driven home with a view to avenging his own injury, received at the hands of Philip, brother of Anthony. It could also be conceived of as inflicted to avenge the wrong done to me by this same Anthony—which will be the interpretation that relieves of penalty through the statute allowing vengeance for injury done to one's relatives. In the other case, there will be application for the statute calling for amputation of a hand, in view of the other provision which punishes a man who wounds relatives of an offender.

The judge, says Baldus, will have regard for intent of mind, determined on the basis of the nature of the actions. For if the injury was slight which Anthony inflicted upon me, and it was a severe injury that Philip inflicted upon John, and the injury to Anthony likewise was severe, it will be judged that John has avenged his own injury upon the brother of the man who injured him, and not that he has avenged the injury done his own brother—and this in view of the disparity and incongruity of the vengeance as compared with the injury done his brother.

[c] *Consilia*, Bk. IV, 165 (*Pacem inter se*).

And hence the conclusion of Pietro Paolo Parisio[c] in a case where two family groups had made peace with one another, and later a man

meeting an individual of the other family knocked him with his elbow, and, as he says, checked[1] him; whereupon the individual who was struck, in company with many of his connexions, made an assault with an armed band and attacked some of the opposite party. In the consideration of the question who is to be called the peace-breaker (i.e. he who knocked with the elbow, or the assaulted person who attacked others), he arrives at the conclusion that it is the person struck, and not the original aggressor. For, says he, that punch with the elbow might have been accidental, and not malicious or intentional; and even if delivered purposely, it was nevertheless a slight injury. And by a slight injury,
40 he says, peace is not contravened.

But whatever may be his conclusion in the case where it is assumed that the man elbowed purposely, I should think that we ought to take into account the character of the persons and of the deed, and many other details which (quoting Demosthenes) the Jurisconsult[2] in *Digest*, XLVIII. xix. 16, § 6 says must be considered. This passage is in Greek, and Haloander translates as follows:

'For it is not the blow that rouses anger, but the sheer indignity of the performance; and it is not so serious a thing for freeborn men to be beaten[3] (bad though that is) as to be beaten with an accompaniment of insult. For he who beats another may allow himself many liberties, [135] the greater part of which the victim cannot demonstrate and make clear[4] to another person—the pose of body, the expression, verbal abuse, adding now an insult, now impersonating an enemy, now landing a blow with the fist, now slapping[5] the face. These are the things that move, these disturb the even balance of the mind of a man unused to contumely and disgrace.'

It is on the basis of such things that a judge will make up his mind which is to be counted the aggressor in injury, the provoker of strife, and the violator of the peace.

For even he is the provoker of strife who stirs another to anger and
41 causes him to fight, as Baldus has pointed out.[a] And on this ground the
42 same writer declares[b] that a man is not chargeable with injury if he offends under provocation—a statement reported by Felinus, being the last in his lecture.[c]

On the remark above that peace is not considered to have been violated by adultery, or even by theft at the expense of the other party, see the opposing view of Baldus,[d] who says specifically that peace is violated by theft or any other manifest and serious damage.

I should believe that this might be true in case it could be made

[a] *On Feuds*, Bk. II. 28, col. 2, the words *not. ergo*; and *Consilia*, Bk. II, 144 (*Super quaestione*), col. 2.

[b] *Addit.* to Durandus, tit. *De Accusationibus*, the word *provocatus*, following Durandus there in § 1, the words *quid si vocavi te.*

[c] *On Decretals* II. xxiv. 13, last col.

[d] *On Feuds*, Bk. II. 27, chap. i, § 19, toward end.

[1] [Reading doubtful.—Tr.]

[2] [Claudius Saturninus, or as Lenel (*Palingenesia iuris civilis*) surmises, Quintus Claudius Venuleius Saturninus.—Ed.]

[3] [For *cedique* read *caedi*.—Tr.]

[4] [Even with rather free handling, the Latin here but poorly represents the original Greek.—Tr.]

[5] [*cedens*, i.e. *caedens*.—Tr.]

clear that the act arises from an original grievance. For suppose that hostility arose originally because of theft or adultery, and the same individual should again commit theft or adultery, either in the case of the same thing or person, or in the case of some other: Will it not be said that the peace is broken?

But if the new offence[1] has no connexion[2] or similarity with the original grievance, then I should hold with the generally accepted[3] view of others.

As to the question whether the offence is new,[4] or of the old type, the judge will decide according to the circumstances, this procedure being suggested by *Digest*, IV. ii. 14, § 1. (Here Angelus notes that, though intimidation may justify an action for injury, still, if it is brought to bear for purposes of plunder and loot, it will not supply the basis for such action. For bandits, he[5] says, do not lie in wait on the road with intent to inflict injury, but to secure loot and gain.)

But what if peace has been made between two families, and those 43
present have given a promise for the absent, with assurance of ratification and the incorporation of a penalty? If some one of the absent, before he has ratified the pact, should injure a member of the other family, would the penalty be incurred, and are those who made the promise liable to this penalty for the breach of the peace?

[a] *Consilia*, Bk. II. 40, col. 2.

See Corneo,[a] who holds that the penalty is incurred, even though[6] 44
the injured person had not ratified the pact. For already the right of action was open to the contracting parties as a result of the treaty, though both parties were under a check because of the exception of consummation not effected (i.e. of ratification not yet accomplished); but this consummation one party could accomplish even after the penalty had been incurred by the other.[b]

[b] *Ibid.*, no. 16; and *Consilia*, Bk. II. 41, no. 2.

And if the clause [135′] is added: 'while the pact remains inviolate', 45
and the other party, which was injured without provocation, should contravene the peace, the penalty will not again be incurred thereby; especially if there was the safeguard of an oath in the peace instrument, and the contracting parties were not minors (in view of *Code*, II. iv. 41[c]).

[c] No. 16, as above.

However, as for his statement that the penalty is incurred for an injury even before ratification of the pact, this was debated by Dynus, according to Bartolus on *Digest* XLVIII. v. 14, § 6, who says that this law is evidence that subsequent ratification is not retroactive, if matters are not still in the original status. This point Bartolus there leaves undecided. But Paolo di Castro[d] holds for the contrary view of Corneo; and as regards the argument of Bartolus 'that matters are not still in the original status', he replies that if they are not in the original

[d] *On Dig.* XLVI. viii. 24.

[1] [See note 2 on page 305.—Tr.] [2] [*cõe*, i.e. *commune*.—Tr.] [3] [*cõi*, i.e. *communi*.—Ed.]
[4] For *nova, ne* read *novane*.—Tr.] [5] [For *ipsae* read *ipse*.—Tr.] [6] [*ẽtsi*, i.e. *etiamsi*.—Tr.]

status through culpable action of the enemy, it amounts to the same thing as if they were still in the original status.

46 This was the situation in the case above considered. For the aggressor there had no right so to act that it should not be within the power of the other party to ratify the peace;—which accords with the view of Baldus,[a] who says that, though the man had not yet ratified the pact, he should not have been injured without good reason, nor attacked with headlong haste.

(This I think sounder than what Corneo[b] said in a similar case,[1] namely that a peace or truce does not include a person who has not yet been named, and who in the interim has been killed—on the strength of arguments which, in my judgement, are very weak.)

47 Angelus[c] claims, however, that the penalty will not be enforced to the enrichment of the person injured, but to the advantage of those who made the pact. This perhaps is reasonable, in view of the fact that in the reverse case they would be liable for the penalty (i.e. if an injury on their side had followed before ratification), as was pointed out above. So it is natural that advantage should fall to those who are liable to disadvantage.[d] But see below.[e] Nothing of this, however, was said by Corneo in the *Consilia* above cited, perhaps because of excessive haste in his decisions.

48 We should note, further, a point brought out by Socini,[f] namely that he who makes peace for self and followers is under obligation to arrange and see to it that they keep the agreement; otherwise he is himself responsible. In support of this he cites Bartolus.[g]

49 Corneo[h] adds, however, that even when peace has been broken and the penalty incurred, it is not considered that peace is at an end so far as others are concerned. Thus it will not follow that they may be injured, though one of their party has contravened the peace, but he is the one that will bear the punishment. This is reasonable with reference to a peace between individuals; but in case of war I should think that the nature of the breach would have to be considered very carefully. But I do not carry this matter further. (And as for the statement that only the individual is liable who contravened the peace, and not the others, [136] Corneo[i] offers further confirmation, citing Bartolus.[j] See also below.[k])

50 Once more, Corneo[l] declares that if two towns have made peace and a covenant not to injure one another, either generally or specifically, it is understood[2] that this agreement applies to those of adult age at that time when the peace was made, and not to those who subsequently may have come of age (thus confirming a conclusion already reached above, namely that the development of a new occasion exempts from an original penalty); however, if an injury is done, the peace-

[a] *On Code* IV. xxviii. 7, the words *et per hoc determinatur quaestio.*

[b] *Consilia*, Bk. II. 218.

[c] *On Dig.* XLVIII. v. 14, § 6.

[d] *On Dig.* L. xvii. 10, with other familiar laws.

[e] Under no. 53, near middle.

[f] *Consilia*, Bk. III. 87, last col. but one, the words *sed tamen.*

[g] *On Dig.* III. iii. 67; and on *Code* II. xii. 24.

[h] *Consilium* 40 (above cited), no. 18.

[i] *Consilia*, Bk. III. 167, col. 2, the words *et quando plures promittunt.*

[j] *On Dig.* XLII. ii. 19, qu. 2; and on *Dig.* XLV. i. 4, § 1, qu. 6.

[k] Under no. 53, near the middle.

[l] *Consilium* 167, above cited.

[1] For *casu. Idem* read *casu idem.*—Tr.]

[2] [Omit *quòd* before *intelligitur.*—Tr.]

breakers will be liable to the penalty otherwise prescribed for the wrong of which they are guilty.

And he adds that if in the case of an individual a new circumstance develops, and his old friends and associates run up to help him, no one of them will be held guilty of breach of the peace, because that new circumstance excuses all, and causes an abandonment of peace; hence peace no longer exists, and nothing can be predicated of a thing non-existent.

[a] *Consilia*, Bk. II. 113, col. 2, the words *alia ratione*.

Alexander[a] says also that after peace has been violated by one party, 51
the stipulated penalty is not incurred thereby, if the other also contravenes it—even though there be in the peace instrument the phrase 'while the pact still holds', or the proviso 'so that the penalty be incurred as often as', &c. For, says he, those phrases operate solely for the 52
advantage of the party that keeps the pact, and not for the advantage of the peace-breaker; for he in vain looks to the law for help who is a transgressor against the law.[b]

[b] *Decretals*, V. xix. 19; *Decretals*, III. xlix. 10.

Such was the view of Socini[c] also; and in regard to this opinion the post-glossators should be consulted.[d] That it is the common verdict Alexander affirms,[e] rejecting the dissenting opinion of Joannes of Imola, and asserting that the phrases above quoted must be taken as applying to the violator; for without them the punishment would be incurred once only, and as a result of the first breach, whereas because of them it is incurred over and over again (though otherwise it might seem impossible that there be infraction of something no longer existent, in view of the rule cited to the effect that a thing non-existent has no elements[f]).

[c] *Consilium* 87 (above cited), last col. but one, no. 2. (*qui a fratre*).
[d] *On Dig.* XLV. i. 96; *Dig.* II. xv. 16.[1]
[e] *Ibid.*
[f] *Dig.* XII. i. 41; XIX. i. 4, § 1.

Baldus[g] says, moreover, that if a person who has broken the peace pays the penalty, the peace appears to be reinstated; consequently, if another of the opposing party were to violate it too, the penalty would be incurred by him[2] also. This seems reasonable; and Imolensis follows here,[h] inferring on this ground that if the[3] original peace-breaker is injured after paying the penalty, he too can lay claim to the penalty agreed upon—for the penalty paid by himself is in the nature of a satisfaction, which is the argument here used by Baldus.

[g] *On Dig.* XXIV. iii. 26.
[h] *Ibid.*

But Alexander here dissents,[i] on the ground that he who injures in retaliation does not incur the penalty—which also was [**136**'] the view of Paolo di Castro,[j] even in case the phrase is added 'while the pact still holds'. Perhaps the verdict of Baldus is truer and fairer, namely that payment of penalty takes the place of observance of the pact, as he bids us note.

[i] *Ibid.*
[j] *On Dig.* XLV. i. 96

So Cino on *Code* II. iii. 27,[k] where Alexander also comments,[l] in a question concerning a person who has contracted to exchange his

[k] the words *quid dicemus*.
[l] No. 14.

[1] [Correcting false reference.—Tr.]
[2] [For *ipsae* read *ipse*.—Tr.]
[3] [For *ipsę* read *ipse*.—Tr.]

horse with another under pain of a forfeit; and even if the man should not make the exchange, but has paid the forfeit and it is an equivalent, he may sue for the horse. Or rather, let us say, it should be considered whether the forfeit is exacted on account of the breach of contract or as profit. In the first case the payment is of no advantage to the contract-breaker, because thereafter he will not have the support of the contract; but in the second case, the situation is different. So Baldus on *Digest* II. xv. 16, second lecture.

And on that passage all the post-glossators make the comment that the phrase 'while the pact still holds' can never thereafter help a person who has once broken an agreement,[a] unless another clause is added with it: 'the penalty having been paid, or not', &c.[b] But I fail to see on this basis what help there would be for the covenant-breaker,[1] if the verdict of the Doctors above recorded is correct.

Angelus[c] said, too, that the man who brings intimidation to bear is counted as contravening a peace; and Baldus[d] gives the explanation. For, says he, injury involves violence, from which fear is inseparable; whereas theft does not inflict injury, but loss.

53 This explanation does not fit with what has been said above in regard to adultery; for through it the gravest injury is inflicted.[e] In fact even obscene language addressed to a wife constitutes injury, as Baldus[f] admits. And this is manifest enough; for no one could fail to be injured by such procedure.

Bartolus[g] recognized the provocation, and offers the explanation that the case of a vassal differs from that of an utter stranger, in view of the profound respect owed by a vassal to his lord. But this explanation does not seem conclusive, because, as I have said, no one with a spark of self-respect would not experience resentment[2] and feel himself injured by such procedure.

Bartolus offers another explanation that seems to have more point, namely that in peace instruments it is customary (he says) to insert a phrase to the effect that the parties agree not to offend on the basis of the original quarrel, as he puts it.[3] This might be accepted, in case there are not added other more comprehensive clauses; but if it were agreed not to offend further, I should think that the penalty would be incurred for adultery too.

This view is supported also by the arguments which are advanced by the Doctors on a very similar question, which is as follows: Titius made peace with Sempronius, with a covenant not to inflict injury. Later Titius wounded a brother of Sempronius. Query: Is the peace said to have been contravened?

The Doctors agree generally that it is not.[h] And the chief

[a] So Jason at length there, last col., the words *in glossa ibi, l. si una.*

[b] So Jason *ibid.*

[c] *On Dig.* IV. ii. 14, § 1.

[d] *Ibid.*, § 1, the words *post annum.*

[e] As is made clear in *Feuds*, Bk. I. v, § 1.

[f] *Ibid.*, at the beginning, no. 18.

[g] *On Dig.* XLVII. ii. 25.

[h] So *on Dig.* XLV. i. 126, § 2.

[1] [Reading *contravenienti* for *convenienti*.—Tr.] [2] [For *egreferret* read *aegre ferret*.—Tr.]
[3] [Belli thus apologizes for the use of the word *briga*.—Tr.]

arguments [137] are that a brother does not institute action on account of injury done to a brother, and action is not open to him in his own name. But these considerations do not apply to injury through adultery; for there the husband is injured, and he institutes action on his own account.[a] For he prosecutes under a husband's right, and takes precedence over all others, even the father.[b] It would seem that this should be added to what I have said above;[c] but since the Doctors generally[1] adhere to the view which is there expressed, we should not lightly abandon that verdict.

As for my further remark above[d] to the effect that only the covenant-breaker (and not also his allies and associates) is liable for the penalty of breach of the peace, there is support in a statement of Bartolus[e] to the effect that though many on both sides participate in a peace-pact, and individually agree to the penalty in full for those who shall contravene the same, still if an individual contravenes the pact by injuring a man of the other party, only the injured person, and no one else, will bring action for the penalty.

Bartolus puts this more clearly elsewhere[f] (and see Alexander too[g]). So Angelus,[h] who adds that, strictly speaking, all members of the party of the offender should be liable for the penalty of contravention; but that, from the point of view of equity, it suffices that he alone be forced to pay who broke the pact. The same thing was said by Bartolus also.[i]

But his statement that only the injured person brings action for the penalty does not fit with what was said above,[j] where I cited Angelus on *Digest* XLVIII. v. 14, § 16. To harmonize, we might assume that much depends upon the way in which the terms of the agreement and peace were drawn up; so Bartolus.[k]

It should be noted, further, that if many heirs succeed a man who has made peace,[2] and one of these offends,[3] the penalty is a liability upon all (but in reasonable proportion, and not in full). For they all represent that one individual, as Angelus pointed out.[l] He makes a distinction, however, between the heir of a man who has entered into a formal contract, and the heir of one who has merely promised (so Bartolus, too, and others[m]), and also between an act consisting of parts and an act indivisible.[n]

The Doctors raise also the following question[o]: If a statute pro- 54
vides that settlement for homicide be on a money basis, in case the slayer makes peace with the heirs of the dead man; whereas if he does not so make peace, the penalty shall be death: if there are many heirs, must peace be secured from all, or would it suffice to secure it from one? Oldradus held that peace with one is sufficient; but Bartolus[p]

[a] *Dig.* XLVII. x. 1, § 9, and 18, § 2.
[b] *Dig.* XLVIII. v. 2, § 8; XLVIII. v. 3 and 4; XLVIII. v. 12, § 3.
[c] No. 37.
[d] No. 49.
[e] *On Dig.* XLV. ii. 19, qu. 2.
[f] *On Authentica*, following *Code* VIII. xxxix. 2 (*Hoc ita*), qu. 13.
[g] *On addit.* to Bartolus, *ibid.*
[h] *On Dig.* II. x. 9, § 1, the words *ex praedictis etiam.*
[i] *On Authentica*, following *Code* VIII. xxxix. 2 (*Hoc ita*), qu. 13, last words.
[j] No. 43 ff.
[k] *On Authentica*, following *Code* VIII. xxxix. 2 (*Hoc ita*), col. 10, qu. 13.
[l] *On Dig.* XLV. i. 2, § 5.
[m] *Ibid.*
[n] *Ibid.*; and on *Dig.* XLV. i. 4, § 1.
[o] *On Dig.* XLV. i. 4, § 1.
[p] *Ibid.*, last col.

[1] [*cõiter*, i.e. *communiter*.—Tr.]
[2] [For *pac* read *pacem*.—Tr.]
[3] [For *cont roveniat* read *contraveniat*.—Tr.]

requires the agreement of a majority. Alexander demands even the consent of all, however many they be—a view to which Jason also inclines. And Ripa[a] states that this is the general opinion.

[a] Under no. 103.

55 [137] Further: In what manner shall the fine agreed upon be distributed among those on whom it falls? We may quote Alexander,[b] who says that the two contracting parties are to be regarded as two corporate bodies; so that, even though on one side there are ten men and fifty on the other, only one penalty is incurred, and this will be assessed to each individual in proportion to the number of persons participating in the contract. This is in line with the view of Bartolus—on *Digest* XLVII. ix. 7,[c]—who lays it down as a universal rule that when a corporation or religious guild is subject to penalty for the wrongdoing of a member, the penalty is never imposed in full upon all, but all are cleared through the payment of one.

[b] *Consilia*, Bk. IV, 116 (*Viso instrumento pacis*).

[c] the words *quaero quando tenetur villa*.

And as for the statement frequently made above to the effect that punishment is not incurred when a person avenges himself under provocation, understand this as applying to the penalty named in the pact. For the fiscus may well bring action for a penalty imposed by the law of the state.[d] However, it will advantage the man even in regard to the fiscus, if the penalty called for by the pact should chance to be due there as part payment. For if he is not liable for that part, thus far he will not be liable to the fiscus either. So Corneo.[e]

[d] *Dig.* XLVIII. v. 2, § 4.

[e] *Consilia*, Bk. I, 51, under no. 9.

56 The question whether a guardian may make peace for a ward, or an agent for an adult, is considered by Baldus,[f] who decides for the affirmative, adding, however, that such persons may not subjoin a penalty, nor make a peace that will be humiliating. So Jason too declares.[g]

[f] *On Code* II. iii. 22.

[g] *Ibid.*

But Paolo di Castro[h] states without qualification that a guardian may make peace for a ward, even to the point of condoning an injury; but Jason[i] declares that this is unseemly, finding support in *Digest*, XLVIII. v. 12, § 3. However, this law has little application, despite what is said by Jason, and, before him, by Angelus. For it is one thing to condone injury with a view to peace, and quite another to put a money value on a serious offence—a proceeding which the jurisconsult scores in the passage cited ('he did not blush to choose the benefit accruing from the dower in preference to avenging his family').

[h] *On Dig.* II. xiv. 15, which he reads with 10, § 2.

[i] *Ibid.*

The general question is treated also by Baldus,[j] who says that with the guardian's consent, a ward may make peace. In fact even on his sole responsibility the guardian may so do, if the ward is still an infant (this, however, is perhaps subject to doubt). So, too, the ward may[1] take such action for himself, with the concurrence of a judge acting as guardian. And in these cases restoration *in integrum* will be precluded.

[j] *On Code* II. xxi. 1.

57 Next I raise the question whether a son who is not his father's heir

[1] [*pōt*, i.e. *potest*.—Tr.]

has the right to make peace regarding the latter's murder, on such terms as to[1] relieve the slayer under the statute above described; and a passage in *Digest*, XXIX. ii. 20, § 5, looks toward an affirmative answer.

Hence Bartolus there judges that if the son makes such an agreement and accepts the money, he is counted as intermeddling[2] in the inheritance; but if the statute stated that peace should be secured[3] from a son,[4] this act would not involve intermeddling.[5] (In fact it would not, even though the reading of the statute were 'from the father's heirs'; for the fact of his being an 'own heir' would give a son the right to do this, even without intermeddling—according to the remarks of Bartolus himself on [138] *Digest* XXVIII. vi. 12, where, toward the end of his *Commentary*, he treats this same question.)

It appears, however, that there is a lack of logic in his statement on *Digest*, XXIX. ii. 20, § 5; for if peace must be secured from the heirs of the murdered man, a son, in making peace, seems to be performing an action that cannot be performed except in the character of an heir. And yet he says that when the statute demands that peace be secured at the hands of the father's heirs, the fact of a son's being an 'own heir' has this effect that, even without intermeddling, he can make peace. Hence[6] it is not an action of such a kind that it cannot be performed apart from the character of heir—though this is what Bartolus had stated a little above. Unless it should be said that there is a difference in the wording of the statute—i.e. simply 'from the heirs', as against 'from the heirs of the father only'; but herein I hardly see how there could be a difference.

The Doctors, however, appear to have expressed themselves variously on this question. For Cino and Baldus, as reported by Alexander,[a] hold that in the very fact of making peace a son appears to intermeddle; whereas Saliceto[b] recognizes a distinction: (1) A man makes peace in the character of a son, and then he is not said to intermeddle, because it does not necessarily follow that he acted with intent that the peace should bring advantage under the working of the statute; or (2) it is specified that peace is made in order to give scope for the operation of the statute, and then (since that cannot be done except in the character of heir, this qualification being required by the statute) he is said to have intermeddled in the inheritance;—for the words should be understood in their stricter sense, and, therefore, of one who has become an heir really, and not in mere name.

[a] *On Dig.* XXVIII. vi. 12.
[b] *On Code* V. li. 4.

My judgement is that it is better to hold simply, with Bartolus, that the son is not regarded as intermeddling; and that, nevertheless, there is scope for the statute—despite what Jason may have said on

[1] [For *itaut* read *ita ut*.—Tr.]
[2] [For *in misceri* read *inmisceri*.—Tr.]
[3] [For *habeat* read *habeatur*.—Tr.]
[4] [i.e. 'son' as contrasted with 'heir'.—Tr.]
[5] [For *in mixtionẽ* read *inmixtionem*.—Tr.]
[6] [Reading not clear.—Tr.]

*Digest* XXIX. ii. 20, § 5. For it is certain that his being an 'own heir' has the effect that a son, even without intermeddling, is counted an heir, whether this looks to his advantage alone, or also to his advantage and that of a third party, as stated by Imolensis.[a] And this applies particularly when something is in question which does not affect the actual inheritance, neither making it increase nor decrease, as in the present instance. For the son in question, though not intermeddling, is yet heir to his own advantage.

[a] *On Dig.* XXVIII. vi. 12, on the basis of that text.

In this case, then, it will be counted as if he had not refrained from intermeddling, and, thus far, there will be, so to speak, two heirs in full: (1) the son, in name and in fact—to the extent of this advantage which he enjoys; and (2) the other, with respect to all the remaining claims of heirship. And so either will be able to make peace;—the son by virtue and potency of being an 'own heir'; and the heir by the immediate right of inheritance;—just as elsewhere we say, in the case of two debtors in full, that payment can be made by either, and by either the account is cleared.[b] (Moreover, Angelus[c] holds that the right of vengeance[1] is open to any one in full; but this looks in another direction, and does not bear on what I have said.)

[b] *Dig.* XLV. ii. 2.
[c] *On Dig.* XXIX. ii. 20, § 5.

58 Angelus[d] also raises the question whether a daughter may make peace with reference [138'] to the killing of her father. And he decides for the negative, on the basis of a gloss[e] which states that this ruling is derived from the Law of the Lombards, which does not allow a daughter to settle a feud, i.e. to exact punishment. And Baldus,[f] too, cites this gloss to the same purpose. Some Doctors treat separately the case where there is also a son living; and then this business belongs to the male sex alone, for both vengeance and the making of peace are tasks for a man.

[d] *On Dig.* XXVIII. vi. 12.
[e] *On Feuds*, Bk. I. 1, § 4.
[f] *On Dig.* XXXI. xxxiv, § 6, el. 2.

But this gloss[g] for the most part finds little favour; and it is held that a daughter also may make peace, either alone, or with a male, if she acts with him. So Baldus;[h] and this is developed further by Alexander.[i] There is confirmation, too, in the remark of the satiric poet that woman is most eager for revenge.[2]

[g] *On Feuds*, Bk. I. 1, § 4.
[h] *Ibid.*, no. 14.
[i] *On Dig.* XXVIII. vi. 12, last col., near beginning.

59 On the question whether a father may make peace in regard to injury done to a son, Bartolus[j] takes the affirmative view, repeating it on *Digest* II. xiv. 30, near the beginning, where other post-glossators also comment. But the qualification must be added: unless the father is an insignificant person in comparison[3] with the son; and, again, [he may] not [make pe ce] in the case of a person closely related to the son (e.g. if it were the son's wife that had inflicted the injury,[k] or if it were one of his ascendants).[l] Both these limitations are noted by Bartolus.[m]

[j] *Dig.* XLVII. x. 17, § 11.
[k] *Dig.* XXIV. iii. 38.
[l] *Dig.* V. ii. 8, at the beginning.
[m] *On Dig.* XXIV. iii. 38.

[1] [For *vindictè* read *vindictae.*—Tr.]
[2] [Juvenal, *Satires*, xiii. 191–2:
*quod vindicta*
*Nemo magis gaudet quam femina.*—Tr.]
[For *cōparitionem* read *comparationem.*—Tr.]

Aside from these two cases, a more stable peace is negotiated by the father regarding injury to a son, than by the son in person. For, as Paolo di Castro[a] points out, a father undertakes the business of making peace with more foresight and wisdom than the son himself. And, in fact, if a statute requires peace at the hands of the injured person, no value would attach to a peace secured from the son unless it were secured from the father as well, according to Paolo di Castro.[b] (I should think, however, that the wording of the statute ought to be looked into; for as a matter of fact the father is one person and the son another, and statutes deal with facts and not with fictions. Unless we were to say that because of their close relationship father and son are the same person, and both really are injured as a result of the injury to the son.) Angelus[c] states, however, that peace made by the father does not suffice, unless the statute so specifies; and this seems to me correct.

And Angelus adds here that the son cannot in turn remit an injury 60
done to the father;—but understand this as applying while the father is still living.

Like a father, an abbot with his chapter may make peace in regard 61
to an injury done to a monk of his, as Baldus[d] pointed out. And this is not surprising; for injury is done to the monastery, too, just as in the case of a church when its pastor is injured.[e]

So Panormitanus[f] states that the bishop takes action in the case of 62
the killing of a priest. And if action is brought under the civil law, one-half of the fine falls to the church ruled by the priest, and the remainder to the bishop.[g] [139] Panormitanus[h] adds also that, in the case of a secular church, action for injury is open both to church and to pastor, and that one action will not be nullified by the other.

And he says, too, that if a priest who holds several churches be killed, the question is raised whether the injury was done with a view to any one of them in particular, and whether the priest held one by permanent appointment, and a second in trust. In this case action will be instituted by the one held through permanent appointment. But if the injury was done on account of both churches, each will bring action. In addition to the above considerations, I think that it should be taken into account in which parish the injury was inflicted (supposing the priest to reside a part of the year in one, and another part of the year in another).

Consuls, syndics, and civil officers may not thus adjust injury done 63
to a state, the support of a general authorization being required. So Baldus,[i] who cites *Digest*, XLIII. xxiv. 3, § 4. He touches also on the question whether a lord may bring action for injury done to a vassal of his, or remit it; and he here makes a distinction between injury to purse and to person.[j]

It is customary also to raise the question whether those who are 64

[a] *On Dig.* II. xiv. 30, at the beginning, which he reads with II. xiv. 38, § 2.
[b] *Ibid.*
[c] *On Dig.* XLVII. x. 17, § 11.
[d] *On Code* II. iv. 12, towards end of *Commentary.*
[e] *Decretals*, V. xxxix. 9 and 36.
[f] *On Decretals* V. xxxix. 36.
[g] According to *Decretals*, V. xxxvii. 2 (according to one reading).
[h] *On Decretals* V. xxxix. 9.
[i] *On Feuds*, Bk. II. 53, no. 6.
[j] *On Feuds*, Bk. II. 53, no. 5.

merely natural sons may prosecute for a father's death, or even make peace regarding it. This point is considered by Innocent,[a] and more fully by Bartolus[b] and Baldus;[c] and they agree that such sons are not debarred —especially if there is no doubt as to their paternity (for they say the same also of bastards). Yet legitimate sons are by all means to be preferred; and perhaps, further, if such are in existence, the others would be excluded.[d]

As a matter of fact, Bartolus[e] says that a natural daughter also will have the same rights. And this renders less doubtful what was said above of a legitimate daughter, namely that she may make peace. However, I do not feel at all sure with regard to these decisions, so far as they concern peace-making, especially if the natural child is not an heir, and there are living relatives and agnates (perhaps of high standing), whose interest is involved; for, as above noted, an injury often affects the whole agnatic group. Hence I should think that the natural children might prosecute, but not make peace. This I leave to the decision of the reader.

65 I raise a question also about another case that often obtrudes. Titius gives Seius an insulting blow, e.g. he slaps him, or strikes him with a cane—a thing which military men resent much more fiercely than if they had been wounded with a sword.

66 Peace negotiations are begun between the two. Says Seius: 'I demand that he put himself in my hands, and at my discretion.' The question is whether that sort of agreement is valid; and, supposing the agreement to be made,[1] what punishment it is permissible for Seius to exact from the said Titius?

As to the first point, Bartolus renders the decision that such agreement is neither permissible nor valid, even though it be the custom to proceed in that way in the state or city in question, as was the case at Pisa. So Bartolus.[f] And the explanation is that a person may not put himself [**139**′] in the hands of another for punishment because that business pertains to the public administration of justice, which is not supplanted by a private agreement. And on this ground Baldus[g] says that such a pact is not valid because it would allow an individual to impose the law's penalty upon the offender; and this he repeats.[h]

Bartolus[i] says, again, that (assuming such a case in fact, and that it is sustained) Seius, the offended party, will nevertheless not be allowed to exceed the bounds in the matter of punishment; and if he does so, he will be liable to punishment himself. For, says Bartolus, Titius is assumed to have surrendered with a presumption of fair and just treatment as measured by the conscience of a good man.

67 This bears on the second part of the question; and it brings to mind the rule that if a person throws himself upon the generosity of any one,

[a] *On Decretals* I. iii. 28.
[b] *On Dig.* XLVIII. ii. 2.
[c] *On Code* IX. i. 1, my second col., the words *quo ad secundum articulum.*
[d] Cf. *Dig.* XLVIII. v. 2, § 8; and *Code,* IX. ix. 19.
[e] *On Dig.* XLVIII. ii. 2, the words *quid de filia.*

[f] *On Dig.* XLVII. x. 1, § 5.
[g] *On Code* IV. xxxiv. 6.
[h] *On Authentica,* following *Code* II. xxvi. 11 (*Sacramenta puberum*), at the very beginning.
[i] *On Dig.* XLVII. x. 17, § 5.

[1] [For *itacōveniat* read *ita conveniat.*—Tr.]

he cannot then be made subject to bodily injury. For, by reason of the very fact that he so abandons himself, it is taken for granted that he does it in order that favour might be shown.

The same is true when a person puts himself at another's disposition, according to Innocent;[a] and he is reported and followed by de Afflictis.[b] And in case the other party chooses to abuse the opportunity put into his hands, the victim should be restored to his original earlier status. So de Afflictis;[c] and Imolensis made the statement more specifically (though he does not quote de Afflictis) on *Digest* XLVI. v. 11—where he explains why we allow wider scope when a person submits to the decision of a third party, than if he were making surrender to the will of his adversary, namely that we are less sympathetic and more prejudiced with reference to a matter that touches us than to one that concerns another. This is a natural and obvious explanation. 68 69

[a] *On Decretals* I. ix. 13.
[b] *On Feuds*, Bk. II. lv, § 5, no. 14.
[c] *Ibid.*

These considerations have a very direct application to the matter of warfare, in view of the problem presented by those men who surrender, and, being no longer able to hold the post assigned to them, give themselves up at discretion—some of whom at times are hanged, while others are sent away to the galleys. This is devilish 'discretion', and an illegal proceeding; for discretion, too, presupposes the standard of the conscience of a good man, as is stated by Baldus[d] and Alexander.[e] 70

[d] *On Code* V. xii. 31.
[e] *Consilia*, Bk. I. 33, col. 1.

Finally, I raise the question whether parties may be forced to make peace. In *Decretum* I. xc. 9, it is stated that they may be, even under pain of excommunication. The Cardinal[f] also declares that the Pope has power to compel sovereigns to make peace (adding that this is shown more clearly in *Decretals* II. i. 13); others, he says, may be so coerced by their judges.[g] 71 72

[f] *On Constitutions of Clement* II. xi. 2, no. 6.
[g] *Decretum*, I. xc. 9 and 7.

Bartolus,[h] too, said that a judge may constrain parties to harmony and peace, after they have contended long—particularly if they are causing disturbance to the state; but not otherwise. But without qualification this is within the power of a council of decurions, or of one to whom they commit[1] the public welfare and everything concerning it; so Bartolus.[i] The general subject is treated in the *Digest*.[j]

[h] *On Dig.* III. ii. 6, § 3, at end.
[i] *On Dig.* L. ix. 4, col. 4, the word *declaramus*.
[j] VII. ix. 1 [?].

[140] Query: If a sovereign has granted amnesty to rebels, either in general or specifically, does this include indirect subjects, especially if their property has previously been delivered over and incorporated with the fiscus of the immediate lord? Petrus de Ancharano[k] considers this question, and decides that it does not include them; though in such a case reinstatement would be granted them as a matter of favour, and at the request of their party—of course, if such action was not prejudicial to the immediate lord, e.g. a vassal [of the sovereign]. Hence, in a public and general amnesty that is incident to a peace and looks to 73

[k] *Consilium* 161 (beginning: *Viso diligenter*), cols. 1 and 2.

[1] [For *ipsae committeret* probably read *ipsi committerent*.—Tr.]

the welfare of the state, I think that such persons should be included, especially when the words of the pact might allow of such inclusion.

74 De Ancharano[a] raises also the question whether such reinstatement includes rebels who died during the progress of the war, and also their property, so that the legal heirs (or even such as are named in a will) may recover it. He concludes that a will made null through crime does not regain its validity (on the ground that last acts are immutable), and so the heirs will not secure the property.

[a] *Ibid.*

Yet, in the case of the compacts many times made between the Emperor Charles and, subsequently, by King Philip, his son, with the King of France, wherein it was provided that amnesty be granted to the exiles of both parties, and that their property be restored to them, I have frequently witnessed the indiscriminate restoration of property, i.e. both to the heirs of the dead[1] and to the living exiles. And this seemed to me very just; for thus the heirs (who had done no wrong) were made to fare no worse than actual offenders.[b] And with this last point even de Ancharano is in harmony, in *Consilium* 287, where he says that the will of a defunct rebel is ratified if drawn up by a rebel clerk, because through reinstatement there is general reversal, and all previous actions are confirmed.

[b] (*Iste B.*), last words.

Baldus has a discriminating *Consilium*[c] on this subject, wherein he says that the wills are ratified, and that this is a concession based on the peace; for whatever the contracting parties agree upon has the force of law.

[c] *Consilia*, Bk. I, 243, beginning: *Quidam nobilis nomine Antonius.*

75 I raise still another question: The King of Hungary made peace with the Republic of Venice;[2] and, among other things, it was agreed that before a certain date the Venetians should withdraw from all the territory occupied[3] during that war, and that they should not keep any soldiers or officials within certain boundaries. The question is whether individual Venetians also were under obligation to leave estates which they held by private right within those bounds;[4] further, whether it was permissible for a city or town within those limits to choose a Venetian as its magistrate (assuming that it had the right to make a choice). On being consulted, Petrus de Ancharano gave it as his answer to the two questions that private parties were not obliged to withdraw, and that they might be elected to office.[d]

[d] See *Consilium* 204, beginning: *Visis et ponderatis.*

76 I now take up another query: A sovereign by [**140**′] manifesto states that Titius has offended seriously against himself, his majesty, and his dominion, and, in particular, by assisting[5] the enemy with supplies, arms, and personal service; 'In view of which action', he says, 'I have appropriated his property as forfeit to my fiscus, and have

[1] [For *defuuctorum* read *defunctorum*.—Tr.]

[2] [Sunday, February 25, 1358. The treaty was signed, '*Venetiis in Ecclesia S. Marci*'. Louis I 'the Great' (1326–1382), was King of Hungary.—Ed.]

[3] [For *usurpatus* read *usurpatis*.—Tr.]

[4] [For *comites* read *limites*.—Tr.]

[5] [For *iuit* read *iuvit*.—Tr.]

presented it to Gaius, my faithful servant'. The point at issue is whether the action of the sovereign should be recognized as valid. Decio[a] goes into this question very fully, and in connexion with an even more favourable case; for it had been provided by a local decree that, for treason, all property should be forfeit to the fiscus, and therein absorbed without any formality and declaration. Yet Decio concludes that the above presentation by the sovereign was not valid. He rendered the same decision in *Consilia* 446[b] and 544, repeating in 606. 77

In all these passages he makes use of the same arguments; namely (1) that recognition should not be given this claim of the sovereign as accruing to his own advantage; (2) that a vassal is not deprived of his fief unless guilt is proved; (3) that a sentence is invalid, if pronounced hastily and offhand, as he puts it ('which is manifest', says he, 'because in the same connexion and at the same moment the sovereign charged rebellion and gave away the property'); (4) that the charge reported could not have been known to the sovereign except through the hearsay of others, and such unsworn witness should not have been relied upon. This line of argument was followed also by Calderinus and Antonius de Butrio,[c] as Felinus[d] reports.

But d'Isernia, who is cited by Decio, seems to me to dissent.[e] For after long discussion he reaches the conclusion that formal sentence normally is essential,[f] but no sentence is required and the claim of the sovereign is recognized as binding, if the charge is such as to be clear to a judge, acting as such (as in the case of a thing done in the presence of a judge, or with the lord sitting at the tribunal), or if the charge concerns a long continued or even immediately manifest activity (as, he says, is true of a man who in time of war keeps in frequent touch with the enemy and helps them, or of one who holds his castle in a state of rebellion against the lord, or who—according to de Afflictis[g]—has emblazoned thereon the arms and heraldry of the enemy).

De Afflictis agrees,[h] following Jacopo Alvarotto.[i] And both d'Isernia and de Afflictis add[j] that it is a good thing that a public instrument be executed touching guilt thus charged, so that the fact regarding it may be in evidence later. But I do not see what help there would be in this; for in case they refer to the original manifesto of the sovereign, it is beyond doubt that this is regularly put into writing, and we therefore revert again to the arguments of Decio which urge 78 that the claim should not be recognized as binding: and if they mean that an instrument [**141**] should be executed as to the crime itself, there is a difficulty, because it is stated that in regard to crime a condemnatory instrument may not be executed.[k] (However, such a precaution would be useful when, in formal trial of a case, witnesses were being examined; for this would be a very reliable support.)

Nevertheless, on the basis even of the simple manifesto of the

[a] *Consilium* 410.

[b] Cols. 13 and 14.

[c] *On Decretals* II. xix. 7.

[d] *On Decretals* II. xx. 8.

[e] *On Feuds*, Bk. I. xxii, § 2 throughout.

[f] *Ibid.*, last col., the words *haec disputatio.*

[g] *Ibid.*, on § 2.

[h] *Ibid.*, col. 4.

[i] Last col. but one.

[j] The former, col. 1; the latter, col. 7.

[k] *Dig.* XLVIII. iii. 6; XLVIII. xvi. 15, with comment by Bartolus; so Felinus, following others, at great length on *Decretals* I. xxxiii. 10.

sovereign I think that the person is secure to whom the property is given in the two cases singled out by d'Isernia and others, namely when a charge is made with reference to a repeated (even if not continuous) activity, or to action immediately manifest; (but not so in the case of a charge advanced regarding a past activity, according to de Afflictis.[a])

And the Doctors compare here what Baldus said in his *Consilia*,[b]
79 when consulted in regard to an actual case. For he there declares that if the Emperor states specifically the reason for his order, we must abide by the words set down in conformity with his will—so that there is no room for argument to the contrary, according to Cino; but if he has made use of general expressions, there will be indeed a presumption in favour of what he said and did, yet there will be room also for argument to the contrary.

And so Baldus there assumes that if the Emperor stated that some one had shown ingratitude to him, and for that reason he deprives him of his fief, proof of ingratitude is not essential. Support for this is supplied by Petrus de Ancharano,[c] who says that if the Emperor advisedly bases an order on such a charge, this affirmation of fact has the same weight as an order of his based on certain knowledge.

Further support is found in the remarks of de Ancharano again
80 in his *Consilia*,[d] where he holds that in the case of notorious rebels of this kind it is permissible to begin with execution of the penalty, confiscating their property and giving it away, and allowing formal action to follow. This side of the argument is further strengthened by a statement of de Afflictis[e] to the effect that it is the right of a sovereign to despoil a notorious rebel, or even to delegate such execution to another, and that against the beneficiary in such a case the person despoiled has access to no edict or means whereby to recover. (However, he is speaking of a case that is clearer in view of an enactment which in the kingdom referred to deals with this matter to the disadvantage of rebels of the kind in question; but it was operative also at Milan in that case discussed by Decio.[f])

Our conclusion, then, will be that in regard to an accusation of action immediately manifest, or occasional, if not continuous, there will be adherence to the order of a sovereign supported by his manifesto. But if it be a charge touching action that is momentary, either (1) the action took place in the presence of the lord himself (as was said of the action which takes place in the presence [**141**′] of the judge seated at his tribunal), and then our procedure will be the same; or (2) it took place in his absence, or perhaps it is even reported as having taken place in the past, and then what Decio[g] said will apply. But even in this case, if the supreme sovereign is concerned, and in the exercise of his absolute power he has so made a statement and issued an order, here, too,

[a] On § 2 (above cited), col. 6, the words *idem si vasallus*; and on *Feuds*, Bk. II, chap. xx, last col. but one.

[b] Bk. I, 328 (*Quaeritur si rex Romanorum*), last col. but one, the words *porro in principe*.

[c] *Consilium* 293, beginning: *Ultra alia*, the word *praeterea*.

[d] *Consilium* 277, beginning: *Ex praedicta facti narratione*; repeated in 439 (*Cum plene facta serie*).

[e] *On Feuds*, Bk. II, chap. xxvii, § 7, no. 15.

[f] See *Consilium* 410, above cited.

[g] *Consilium* 5,[1] above cited.

[1] [Apparently 410 is the number referred to.—Tr.

we must bow to his verdict, in view of *Consilium* 328 of Baldus above cited (to which Decio[a] so rejoins, though he quotes under another number), and in view of the above-mentioned *Consilium* of Petrus de Ancharano.[b]

(This, however, I think must be limited to the sovereign *par excellence*,[1] i.e. the supreme ruler, excluding all of lower rank. For in the case of the latter perhaps such procedure will not hold,[c] as was pointed out by Decio.[d] Felinus[e] discusses at length, and expresses strong doubt regarding the verdict of the Cardinal,[f] wherein the latter takes the affirmative view, even in regard to sovereigns of lower grade, but who have sovereign rights within their sphere. Socini,[g] however, sides with the Cardinal. 81

And this distinction between the supreme sovereign and some inferior ruler I support by a statement of Angelus[h] to the effect that by rescript, sentence, or epistolary message, the Emperor is assumed to enact law, whereas no one beneath him has such power, though a king also will enjoy this privilege. That statement is reported and adopted by Alexander;[i] and Jason,[j] too, supports it at length.

And this rule holds even though the ruler be vicegerent of the Emperor, because the general dignity and power of the Emperor are greater than those of the vicegerent in particular. And in such case there will be no application for the rule of *Digest* VI. i. 76, as is shown by a passage in *Sext* III. iv. 14, where it is held that there are gradations in authority; and the explanation is there given[k] that a gushing spring is greater than the stream which it feeds. And Baldus,[l] too, cites that passage to this effect.) 82

Add further to what has been said above, that if a question regarding goods so presented should happen to arise between the former owner and the person who holds them by contract from the Emperor or even by simple gift—for example, if one party declares he never committed such[2] a crime, and the other in turn insists that it really was committed—the claims of both will have to be taken under advisement, and he[3] will be awarded the verdict who makes the better showing. So we gather from the remarks of Bartolus:[m] 'for in view of the fact that the law itself imposes so severe a penalty upon them, there should be the privilege of demanding that such a person be proclaimed a rebel; and, on the other hand, a man who feels that he has been wronged by such a charge should be able to demand that it be officially declared that he is not such.' 83

He expresses himself more plainly towards the end of the [142] gloss above referred to, where he says: 'the question is raised whether it is permissible to kill a person who is secretly a rebel.' And he 84

[a] *Consilium*, 445, above cited.
[b] 295 [cited above as 293].
[c] *Constitutions, of Clement*, II. vii. 1.
[d] *Consilium* 410, above cited.
[e] *On Decretals* II. xx. 28.
[f] *Consilium* 154.
[g] *Consilia*, Bk. III. 4, col. 3.
[h] *On Dig.* II. xii. 1, gloss beginning: *Immo derogat.*
[i] *On Dig.* XXXVI. i. 11, § 2, the words *hoc est quod multum.*
[j] *Ibid.*, last col.
[k] In gloss on *addit.* of Giovanni d'Andrea.
[l] On *Feuds, Preface*, gloss beginning: *Aliqua sed pauca de principe*, the words *et quia maior.*
[m] *Tract. Qui Sint Rebelles*, in gloss *rebellanda*, near the middle.

[1] [For *antonomasticè* read *authonomasticè*.—Tr.]
[2] [For *talem* read *tale*.—Tr.]
[3] [For *illa* read *ille*.—Tr.]

answers in the affirmative, on the ground that the man by his very act incurs the penalty, adding that in the investigation of the homicide the truth will emerge regarding this charge of rebellion; and he is cited to this effect by Petrus de Ancharano.[a] This is a sweeping rule—that because of having been accused of this crime (even though not overt), a man may be killed, and the homicide justified later on the basis of subsequent proofs. In regard to our present topic this needs to be carefully emphasized, in view of the treatment of Decio,[b] who held that in these days there can be no prosecution for mere rebellion.

[a] *Consilium* 277, col. 2, at end.

[b] *Consilium* 410, last col. but one, no. 26.

And the verdict of Bartolus above recorded conflicts sharply with the *Consilia* of Decio previously cited.[1] For if such rebels may be killed, even before their guilt is proved, how much more, in the case of accusation of crime, will it be possible to take away a man's property and transfer it to another—at least to the point of allowing the latter to justify the confiscation by new evidence, when[2] the fact of the crime is again brought into question?

85 I now touch another point. The people of Genoa and of Pisa engaged in a long-continued war, and at length made a truce to last twenty-five years, and thence onward to include[3] two years after the time either party elected to renew the war, and with the provision that the people of Pisa should not receive exiles and rebels of the Genoese. It is queried whether this should be understood as referring only to persons who were rebels at the time when the compact was made, or also to those who afterward became such.

Consulted in regard to this in an actual case, Angelus ruled that only those are included who were such at the time of the agreement.[c] However, he is speaking of a case where the truce had been so far prolonged that all the persons had died who were living at the time of the agreement; for a hundred years had elapsed.

[c] See his *Consilium* 261, (*Thema praedictum*).

Again, he limits his remark to cases where the arrangement was not reciprocal. For, according to him, the verdict would be otherwise, if the above agreement had been entered into by both sides with regard to not receiving exiles; for under such circumstances it extends throughout the whole duration of the truce.

86 He raises a further question:[d] Suppose that a person was an exile at the time of the truce, that he was reinstated, and, after his return home, he was exiled again because of the development of a new provocation. Would he be included in the terms of the truce and that prohibitive clause? This point Angelus leaves undecided.

[d] *Ibid.* at end.

87 He adds, however, that in *Code* VIII. xxv. 11, there seems to be ground[4] for not including such exiles; but that law proves nothing. For

[1] [See no. 76.—Tr.]
[2] [For *quanto* read *quando*.—Tr.]
[3] [Reading uncertain; *duraturum* is probably for *duraturas*.—Tr.]
[4] [Reading doubtful.—Tr.]

there are two explanations of it, as Albericus there points out: first, that when a person mortgages what he has and what he shall acquire, he cannot be thought of as referring to present possessions that will be alienated and reacquired; for inasmuch as they were included at the time in the pledge made regarding present possessions, it cannot be assumed that he was also thinking of them as future acquisitions.

The second view is that such future acquisitions are included because, on the strength of the agreement, they are assumed to have been in possession at the time the pledge was made, [142′] the effect being retroversive. But along with that fiction we note that the creditor's consent to alienation was secured; hence those reacquisitions are not included in view of said consent. But these considerations do not apply to our present problem.

More to the point is the situation in a question touched on by 88
Albericus there,[a] regarding the permission which a creditor granted to a soldier of the Emperor to absent himself, despite the fact that he had taken oath not to withdraw until he had made payment. For if, after taking advantage of this permission, the man should return, he again reverts to the state of former obligation not to withdraw. So I should judge with reference to the exile in question. See the arguments cited by Albericus there.[b]

[a] [*On Code* VIII. xxv. 11.]

[b] *Ibid.*

Changing the subject, I now raise another question: A certain 89
nobleman in time of war said to a friend of his, 'I put this stronghold of mine in your charge'. What shall we say is conveyed by these words? Let us assume that it is understood that the defence of the stronghold is put in the friend's hands. In that case he will look after everything that concerns its safety; and, consequently, if it were 90
necessary, in view of this trust, to do anything calling for the exercise[1] of absolute authority, it would be taken for granted that this too was covered by his commission (assuming that the lord himself had such powers).

Hence, if the guards and garrison do wrong, or perhaps attempt betrayal, it would be his right to punish them. Likewise he is empowered to hire soldiers needed for defence and to pay their wages at the expense of the lord, or even at his own; and all that he pays out he will recover from the lord. So Angelus.[c]

[c] *Consilium* 35, beginning: *Quidam nobilis.*

But Baldus[d] takes another view. For he says that it should be 91
considered that it was an agency that was conferred upon the man, and that he should make report of crimes to the lord. Yet this same writer,[e] speaking of the commander of two war-vessels, declares that that officer has jurisdiction over his men after the manner of a military chief; also that with regard to the enemy he holds the power of life and death—at any rate in actual practice.

[d] *On Code* IV. xxxv. 1.

[e] *Consilia*, Bk. II. 194, beginning: *Praemissis verbis.*

[1] [For *exercitum* read *exercitium*.—Tr.]

Alexander,[a] too, declared that a custodian's position is a mere
92 agency, without jurisdiction. Bartolus[b] also remarked that the captain of the guard may in moderate degree punish offenders, but that he should refer the graver cases to the lord. On this there is a clear passage in *Code* I. xliii. 1; and I think this position safer than that of Angelus—or rather, that the words of the latter regarding the exercise of absolute power should be understood and qualified in the light of the above statement of Bartolus. In further support of this consult Lucas de Penna.[c]

93 I now inquire whether the aforesaid custodian becomes liable to any punishment in case he loses the stronghold intrusted to him. Make a distinction according as he lost it through carelessness and neglect,[1] in which case his fault beyond question is great. For, as the Gospel says,[d] the keeper of the gate is commanded to watch; and from the very name of his office he should know what is expected of him.[e] [143]

94 For, being guardian of the stronghold, he should see to it that he continue to be what he is.[f] And such persons should beware of the
95 anger of the Emperor; for with him all punishments are discretionary. In fact at his order I have known a soldier to be beheaded who fell asleep while guarding a prisoner of great importance who was being conducted to the Emperor; for while the soldier slept, the prisoner escaped. And although sleep is a natural[2] contingency that cannot be resisted (for no one can keep awake all the time), still sleep is no excuse
96 in a case of real dereliction; so Baldus.[g]

Further, it is stated in a gloss[h] that when a person is bound to make good a defence by virtue of the office assigned to him, he is not excused because of accident that befalls, unless he demonstrates his freedom from blame. The post-glossators comment on *Digest* II. xiii. 6, § 9, and Lucas de Penna[i] goes so far as to say that a custodian is responsible
97 for defence at the peril of his life, adding[j] that he who receives a salary for such service is responsible even for unavoidable losses.

Oldradus, moreover, considers this subject more at length in a
98 *Consilium*,[k] where he raises the question whether it is permissible for a man commissioned by a king to substitute another for himself; and, if he does so and the substitute loses the stronghold, what will the result be? And, according to Oldradus, if he substituted a nobleman, he will be excused, even if his substitute incurred the loss through his own fault; but if he substituted a common person, he is not excused. This, Oldradus says, is the practice of the nobles in his country, and he declares[3] that it is in harmony with the law, finding support in *Digest* XLVIII. iii. 14, near the beginning; and this view is cited with approval by Felinus.[l]

[a] *On Dig.* II. i. 1, first words.
[b] *On Dig.* I. xv. 1.
[c] *On Code*, XII. lx. 2, col. 2.
[d] [*St. Mark*, xiii. 34.]
[e] *Code*, I. xxviii. 1.
[f] *Code*, I. lv. 5.
[g] *On Dig.* I. xv. 3, § 1, last words.
[h] *On Dig.* XXXI. xxxii, § 5.
[i] *On Code* XII. lx. 2, col. 3.
[j] *Ibid.*, last col. but one.
[k] 92, beginning: *Rex habebat castrum.*
[l] *On Decretals* V. xii. 17, col. 1, and *Decretals* V. i. 16, at end.

[1] [The alternative is taken up below in another form (see no. 98 ff.).—Tr.]
[2] [For *naturalis* read *naturale*.—Tr.]
[3] [For *dici* read *dicit*.—Tr.]

However, the custodian will not be obliged to submit his choice of substitute to the king, since it suffices that the man be commonly judged satisfactory at the time of appointment. So Oldradus here.[a]

But if the man himself delegated by the king has lost a stronghold, and that too by design, he is certainly inexcusable; so also if the loss resulted from serious dereliction.[b] And in fact he will be held responsible for a slight fault—even very slight, but his punishment will not be as severe.[c] But if he is guilty of no fault (e.g. if the loss resulted from the attack of an overwhelming force), there are laws to exonerate him.[d] For therein we read that watchfulness is small security against over- 99
whelming force.

Oldradus, moreover, makes the distinction: (1) Fault preceded 100
disaster, and then without doubt the disaster is not excused.[1] For suppose that the custodian fails to make proper provision for supplies, fortification, or arms; or suppose that, like the majority of castle-commanders, he falsifies the muster roll with the idea of embezzling pay—and for these reasons his post is lost; surely he will be deserving of heavy [**143′**] punishment: or (2) No fault preceded, and then it would seem that he ought to be acquitted.[e]

Hence also Baldus said[f] that the impossible must not be required 101
of custodians. But even in this case Oldradus[g] declares that the custodian will still be liable according to rules in force among nobles, i.e. according to custom. For, says he, inasmuch as the king assigned 102
the trust to the man in time of war and in the face of impending force, he seems by right to be held liable even against such attack; compare *Code*, IV. xxiii. 1, where Jacobus of Arezzo so reports on the remarks of Oldradus there. His words are transcribed by Giovanni d'Andrea,[h] in his usual fashion.

And d'Andrea adds that it gravely prejudices the castle-commander's case that he undertakes a defence in time of war, whereby it seems to have been tacitly agreed that his defence would be of such a character as not to yield even before overwhelming force.

He says also that he had heard that it was ruled in court that a castle-commander who has substituted another is excused, if the latter was a nobleman.

Moreover, what is said of a man who has undertaken the defence of a castle in time of war is confirmed by the statement of the Doctors that release is not granted a person who has undertaken a contract while war was in progress. On this see Baldus[i] and Alexander,[j] who cites Giovanni d'Andrea.[k]

Lucas de Penna[l] also said that a hired custodian is liable for 103
unavoidable losses; and he declares[m] that such a one is bound to resist overwhelming odds, but with the qualification:[n] 'so far as he is able'.

[a] As above.
[b] *Code*, IX. iv. 4.
[c] *Dig.* XLVIII. iii. 14, § 2; XLVIII. iii. 12.
[d] *Dig.* XIX. i. 31; XIX. ii. 41.
[e] *Dig.* XLVIII. iii. 12, near end.
[f] *On Dig.* I. xv. 3.
[g] *Consilium* 92, at end.
[h] *Addit.* to Durandus, on rubr. *De Locato et Conducto.*
[i] *On Code* IV. xxxii. 17, col. 2.
[j] *On Dig.* II. xi. 4, § 4, no. 17.
[k] On rubr. *De Loca.*, above cited.
[l] *On Code* XII. lx. 2.
[m] On rubr. *Code*, XII. xliv., col. 2.
[n] *Ibid.*

[1] [For *excusat* read *excusatur*.—Tr.]

And if this rule is honestly interpreted and acted upon, I think that it will satisfy any lord. For no obligation requires impossibilities, and it would be suicidal to say otherwise. In fact rulers would not be able to find custodians on other terms. And he who has done his best has fulfilled the law.

The above mentioned principles I myself at one time applied to the case of Joannes Baptista Furnarius of Genoa, who had been made commander of a garrison at Alba (which was my original home). He was ordered by the army head to give over the defence of that city and to come to him; but because of an illness (feigned, or perhaps real) he neither came nor relinquished his commission.

Meanwhile the French took the city by a surprise attack, at a time when Furnarius had substituted, as supervisor of the watch and defence, a certain Ricius de Lechio Regnicola, an unknown and untried man, to whom probably he would not have intrusted a thousand crowns for delivery at Genoa. Furnarius himself, while imprisoned, and during the trial of his case at the city of Alessandria, made his escape from there, being in fear for his life.

Therefore, the commanders of strongholds should have a care, and they should ponder long (to quote the poet)

'What weight the shoulders bear, under what they sink.'[a]

[a] [Horace, *Ars Poetica*, 39 ff.]

For, with thoughts centred upon advancement and gain, they rashly imperil their lives. [144] Thus, I have personally known of a custodian of the citadel of Valenza, near Alessandria, who was executed for surrendering his post to the French, though the latter had arrived in great force, against which it was perhaps impossible for him to hold out.

104 Under this head there is also a noteworthy case in regard to which Oldradus gave an opinion. The King of Spain assigned the care of certain forts of the Templars to a commander of the Order of Alcántara.[1] The Pope (or his agent and representative) directed this commander to restore the forts in question to the Templars, above mentioned. The man refused to make restoration to them, but delivered the forts to the King, for which action he was excommunicated. In this case Oldradus argues, for the defence, that the man should have been absolved, because it was his duty to consult his honour and to regard the obligation he had undertaken to the King. And this view he supports by many arguments.

105 Furthermore, those who surrender their posts (even when an overwhelming force threatens, which they cannot resist) should beware of accepting money (for the opposing commanders often are willing to pay a great price, in order to save time and to avoid the uncertain issue of chance), lest there befall them the fate which Boerius[b] says

[b] *De Custodia Clavium Portarum Civitatum*, no. 25.

[1] [For *Aleātara* read *Alcantara*.—ED.]

overtook a certain Frenchman, who[1] surrendered his post to the Genoese; and, though he thought to receive money at Lyons from a money-changer and banker, he was decapitated, and his dead body was placed on the wheel. I urged the same penalty also for a certain soldier who had surrendered to the enemy the citadel of Ivrea[2] which had been put in his charge, receiving some hundreds of crowns on the score of supplies and food which he claimed he had in that stronghold. But the general did not take that view of the case.

[a] *Ibid.*

Boerius also warns[a] that commanders of strongholds should beware 106
of talking (or of giving ear to talk) about surrender; and his advice is good. For such giving of ear is half-surrender; for, as the common saying has it, 'The castle that parleys is half[3] surrendered'.

He said, too, another thing worthy of note, namely that if the 107
custodian of a stronghold has given security for its safety, and it chances to be lost, the bondsman is not held to the payment of the sum named in the bond, but only to the extent of the loss. For this he cites Dynus.[b]

[b] *On Dig.* L. i. 17, § 15.

Certain other points regarding this matter of custodians of strong-
holds are treated by Martinus Laudensis,[c] who holds the view that I have stated above in regard to cases where fault precedes disaster.

[c] *De Castellanis et Castris*, qu. 5.

In his tenth question he adds that a man who has given security 108
for the custodian of a stronghold is not liable, if the latter betrays his post. He cites Albericus on *Digest* XII. iii. 1, where he says this; and a passage in *Code* XI. xxxv. 1, seems to support that view. However, it is my opinion that the terms of the bargain and agreement should be closely examined. But in no case will bondsmen be liable to corporal punishment: for it would be absurd that one man should be beaten for the wrongdoing of another.

Under question 21, Laudensis states that a fortress-commander 109
who suffers the enemy to devastate the district should be burned alive. But this must[4] be understood, according to the law which he cites, in cases where the man had an understanding and traitorous [144′] agreement with the enemy on this point, or shared with them in the plunder. For under other circumstances, even though he neglected to defend his boundaries, I should not think that such drastic punishment was called for.

[d] *Ibid.*

He says also, in question 26,[d] that a stronghold-commander who, 110
on news of the approach of the enemy, takes to flight and abandons his post, ought to be severely punished. He cites Angelus on *Digest* IV. ii. 9, near the beginning, where he states that these officers should not flee at the sound of the trumpet and drum, but that they should await a siege, and defend themselves manfully; but if the enemy attack in overwhelming force, they are exonerated, if they retire.[e] So Angelus. This should be understood in the light of the nature of the man's post

[e] *On Dig.* IV. ii. 9, at the beginning.

[1] [For *cui* read *qui*.—Tr.]
[2] [Surrendered to the French, 1544.—Ed.]
[3] [Reading uncertain.—Tr.]
[4] [For *bebet* read *debet*.—Tr.]

and the provision that he be not held to impossibilities. For he who does what any good man in the same situation would do, seems to me to have fulfilled his duty in the sight of God and man. (This is very much a matter of judgement with the general and the sovereign; and they should be reasonable.[a])

[a] See [Corneo], *Consilia*, Bk. IV, 148, [beginning]: *decisionem.*

The further question is raised: If a statute punishes a crime and injury committed in the night time, but revokes the penalty if peace is arranged between the parties; assuming that peace is made regarding it, but with no mention that the crime was committed at night (as actually happened in a case), would the peace benefit the offender? In his *Consilia*[b] Baldus says that it does; see his reasons there.

[b] Bk. IV, 378, beginning: *Videtur mihi Bal.*

111 He discusses also[c] another question worthy of note: If peace has been made, with a promise not to do injury to person or property, under a penalty of a hundred [crowns] to be incurred 'as often as', and with bondsmen given; suppose now[1] that members of one party kill an individual of the other, and sack and plunder his home; is a double penalty incurred (i.e. for homicide and for looting)?

[c] *Consilia*, Bk. IV, 387, beginning: *Proponitur quod inter quosdam inimicos.*

Baldus concludes that a distinction should be recognized. For (1) the plundering preceded the homicide, and then the penalty is repeated, or (2) the homicide preceded, and the penalty is incurred but once. The argument in the second case is that the peace is broken by the personal injury; therefore, it cannot be further broken, being non-existent.[2] Again, the contract of the peace is brought to an end by death. Again, one who is dead can no longer suffer theft or injury; and this is true also of the inheritance not yet claimed.[d] However, if the plundering instantly[3] follows the murder, before the homicides turn aside to other activities, they incur double guilt and a double penalty. So Baldus here.

[d] *Dig.* XLVII. iv. 1, § 15.

In regard to this question I should think that a further distinction ought to be made. For suppose that there are many contracting parties on either side, as Baldus there takes for granted in describing the case: if one individual was killed, are not the others injured also in respect to the plundering which follows the murder? And if they are injured, and if the plundering is a violation of that provision whereby it was agreed not to injure even in the matter of property, is it not more just and equable to say that the penalty is incurred twice?

Nor is his reasoning conclusive where he says that the peace is broken and nullified, and, consequently, [**145**][4] that it cannot be further contravened. For in view of that phrase 'to be incurred as often as', &c., the penalty may be incurred repeatedly, especially in the person of the actual offender.[e]

[e] Alexander, *Consilia*, Bk. IV, 115; and Corneo, *Consilia*, Bk. II. 40, above cited.

Furthermore, in the case referred to by Baldus above discussed, I

[1] [For *ex inde* read *exinde*.—Tr.]
[2] [*nullum*; perhaps for *nulla*.—Tr.]
[3] [For *incontinenti* read *incontinente*.—Tr.]
[4] [For *p.* **146** read *p.* **145**.—Tr.]

think[1] that we ought to take into consideration how the articles of peace were worded. For if injury done to the person or property of an individual of one party constituted an offence to all the members of that party (as the nature of the situation suggests), then, even though punishment be not incurred on account of the plundering of his property after his death (from the point of view that it is not subject to theft or plundering, because the inheritance is not yet claimed),[a] still injury would be done to the survivors[2] of that party; and, with regard to their injury the penalty would be incurred. For this peace 112
is a unity as respects all the contracting parties, and[3] there is not a separate peace for each person included in an agreement, as Corneo[b] has pointed out. These points touching the above *Consilium*[c] of Baldus 113
seem to me to be worthy of consideration.

I raise another question:[4] In that *Consilium* Baldus states that theft cannot be practised upon an inheritance not yet claimed. This is a very old dictum, and Trebatius thought that it was everywhere unquestioned; consequently he made fun of Cicero for saying that there had been a difference of opinion about it among the ancients. Cicero defends himself by showing that Sextus Aelius, Manius[5] Manilius and Marcus Brutus dissented—though Cicero himself sides with Scaevola and Trebatius against them. So we read in a letter of his to Trebatius.[d]

Yet it seems strange that neither theft nor plundering can be practised upon an inheritance not yet taken up,[e] and, for that reason, not even after taking it up will the heir prosecute for theft,[f] though he may bring action for pillaged inheritance (both points being established, 114
according to Bartolus, in *Digest* XLI. iii. 35, though Paolo di Castro dissents). On the other hand, however, if violence or underhand practice befalls the property willed during the time before the inheritance is taken up, the heir, after taking it up, may have recourse to the interdict *quod vi aut clam*.[g] Again, action is granted under the 115
the Aquilian Law for loss inflicted before an inheritance is taken up (*Digest* IX. ii. 43)—a ground for action which a gloss there recognizes, 116
and explains by saying: 'Theft and the Aquilian Law have to do with different things'. This explanation is in harmony with the view of Bartolus,[h] who does not set the laws cited in opposition, but says that theft is not effected while an inheritance is yet unclaimed, for the reason that theft is a seizure against the owner's will; whereas in the case supposed no one is the owner.[6]

Florianus[i] takes issue with Bartolus, because, while an inheritance is still unclaimed, action for theft then committed is allowed [**145**′] to a

[a] *Dig.* XLVII. iv. 1, § 15; XLVII. ii. 69 and 64.

[b] *Consilia*, Bk. III. 8 (*Circa primum*), end of col. 2; Bk. IV, 148, beginning: *decisionem*, last col. but one, no. 8.

[c] [i.e. Bk. IV. 387.]

[d] *Letters* [*to His Friends*. VII. xxii].

[e] *Dig.* XLVII. iv. 1, § 15; XXV. ii. 6. § 6; XLVII. ii. 69; XLI. i. 33, § 1.

[f] *Ibid.*

[g] *Dig.* XLIII. xxiv. 13, § 5.

[h] *On Dig.* XLVII. ii. 69.

[i] *On Dig.* IX. ii. 43.

[1] [For *utputo* read *ut puto*.—Tr.]
[2] [For *super extantibus* read *superextantibus*.—Tr.]
[3] [For *aut* read *autem*.—Tr.]
[4] [Reading doubtful at this point.—Tr.]
[5] [For *Manlium* read *Manilium*.—Tr.]
[6] [*domi.*; i.e. *dominus*.—Tr.]

person who at that time holds the property as a loan, to a fructuary, or to one who has a mortgage upon the estate—though these persons are not owners.

But this is no fair criticism. For it is not only an owner that brings action for theft, but any one to whose interest it is on legal grounds that the property be not stolen.[a] It is not strange, therefore, that in those three cases action is allowed.

[a] *Dig.* XLVII. ii. 10, 11, 12, 86, and 93.

Florianus himself offers the explanation that the reason for the difference lies in the fact of possession itself. For so long as the inheritance is not taken up, no one is in possession;[b] and, apart from possession or holding, it is impossible for theft to be effected. But to me this explanation is not at all conclusive. For a possessor no more appears in the cases where action is given under the Aquilian Law or the interdict than when it is granted under the praetorian law or for theft.

[b] *Dig.* XLVII. iv. 1, § 15.

As a matter of fact, the passage in *Digest* XLIII. xxiv. 13, § 5, seems to discredit the explanations both of Bartolus and Florianus. For it is there stated that the interdict is available for the reason that the inheritance occupies the room of an owner. Thus the true explanation is gathered from *Digest*, IX. ii. 43, namely, that the Aquilian Law gives 'ownership' a wider meaning than do the Laws of the Twelve Tables; for it has in mind, not the person who was owner at the time the loss was inflicted, but at the time action is brought on account of the loss. And this is favoured by considerations of justice—lest otherwise the party who suffered loss be deprived of action and relief, inasmuch as no other action is open to him on the score of his loss.

But as for theft in particular, although, to preserve the inflexibility of the law, action for this is not granted, yet the owner does not lack other recourses. For he may bring action for pillaged[1] inheritance (either to recover his due, or to enforce the legal penalty), and he may sue for the production and reclamation of property.[c] Florianus[d] added that action by stipulation is possible on the basis of *Code* VIII. iv. 1; and property may be regained by suit to recover inheritance.[e] It is not strange, therefore, that, with so many recourses provided, the heir is shut off from one—with a view, as I have said, to preserving the inflexibility of the law.

[c] *Dig.* XLVII. xix. 2; *Code* IX. xxxii. 6.
[d] *On Dig.* IX. ii. 43, last words.
[e] *Code* VIII. iv. 3.

117 The post-glossators obscure *Digest* XLI. iii. 35 also, though its meaning is clear and manifest. For Julianus there raises the question whether a slave whose usufruct was willed is subject to usucapion, if he is stolen while the inheritance is not yet taken up. Julianus recognizes a distinction: (1) action for theft is open,[2] and usucapion is precluded; or (2) such action is not open, and usucapion is possible.

It is clear that the heir cannot bring action for theft, and the

[1] [*expilate*, i.e. *expilatae*.—Tr.]

[2] [*pōt*, i.e. *potest*.—Tr.]

question therefore concerns the fructuary; thus (1) his right to use was already acquired at the time the theft was perpetrated, and he will bring action for theft, and, consequently, usucapion will be checked; or (2) he did not then have the right to use, and he will not bring action for theft, and usucapion will not be precluded.

Here it is assumed that he has the right to use at the time the inheritance is taken up, and security is given by the heir;[a] but if he not merely had the right to use, but actually was using, then action for theft will be brought not only by him, but also by the owner and heir. And in this way we should understand *Digest*, XLVII. ii. 70 and 71, when it states that when a thing is stolen of which another has [**146**] the usufruct, the heir brings action for theft—namely, if the thing was stolen after usufruct began.

[a] See *Dig.* XXXIII. ii. 24.

This seems to me the true explanation of *Digest* XLI. iii. 35; though Paolo di Castro there declares that Bartolus explained it badly (and he himself, perhaps, even more confusedly). The other matters there considered in a gloss are outside the scope of this law, namely, whether there could be a case where action for theft is possible, and yet the property be subject to usucapion; or, on the contrary, a case where action for theft is precluded, and yet usucapion would be prohibited. For it suffices that the rule is that usucapion is precluded, if there is any one to bring action for theft; and that it is possible, in case there is no one who can bring such action. On this both Julianus and Sabinus agree.

[b] *Consilia*, Bk. III. 8.

The following question is raised by Corneo[b]: Many enemies 118
belonging to one party have made peace with a corresponding number of a second party, sanctioning a severe punishment for violators. There is also a statute in that state which directs that the accomplice of a wrongdoer be penalized a hundredfold. Now Titius, one of the enemies above mentioned, with the help of Seius, also one of the said contracting parties, kills Sempronius, with whom they had made peace. Will Seius be liable[1] to the penalty for breaking the peace on the basis of his own crime, and likewise to the penalty of an accomplice, as prescribed by the statute?

Corneo there concludes that Seius will be liable only for the 119
penalty imposed by the pact. For one and the same person cannot be both principal and accessory; and, again, because he would be punished more severely for giving assistance than as principal—which would be 120
absurd; and yet again, because a lesser crime is swallowed up in a greater (which I think is true when one crime is closely connected with the other. For if they were of diverse character, the greater would not swallow up the less, except in cases where penalty is not cumulative. So Baldus,[c] and Angelus[d2] follows).

[c] In comment on *Dig.* XLVII. ii. 36, § 3.

[d] *In Maleficiorum Materia*, in gloss (*et d. malef. semper asti.*), at the beginning.

[1] [For *tenebitur ne* read *tenebiturne*.—Tr.]

[2] [Angelus of Arezzo.—Ed.]

121 He also there raises the question: If some third person (say Gaius) gave aid to both in the matter of the said homicide, would he be liable to the penalty of the statute twice (as accomplice of Titius, and likewise of Seius), or would he be liable once only? And he concludes that the man will be liable but once.

122 Again, he considers there whether the aforesaid Gaius, as an accomplice, is liable to the penalty for breaking the peace, supposing him to be in ignorance of the pact. And he concludes that he is not liable, on the ground that when an accomplice is penalized very severely because of some antecedent condition, the penalty is not exacted, if the offender did not know of that condition.

On this matter of the offender's knowledge, however, he admits
123 that he feels much doubt. And as to the question when the attitude of mind of the wrongdoer is taken into consideration, with a view either to increasing or lessening the penalty, see Bartolus on *Digest*, XLVIII. viii. 14, and XLVII. x. 15, where Alexander also comments.[a]

[a] In *Addit.* to Baldus, on *Code* I. iii. 5, col. 3.

And since many of the questions above treated bear rather upon private amity and peace than upon that of states, I subjoin some remarks about the former by way of a supplement, and to round out my subject.

124 In the first place, we should recognize that, although hostilities arise from injury and offence, [**146**′] it is necessary, however, that immediately, upon their perpetration, these injuries be given attention[1] by the person affected; otherwise he will lose all right to sue for injury. So states the Jurisconsult[2] in *Digest*, XLVII. x. 11. 1, and so the Emperor Justinian.[b]

[b] *Inst.* IV. iv, § 11.

125 Moreover, if a person has thus given attention to injury, and later displays tokens of reconciliation and peace, it is assumed that the
126 injury is forgiven. So the Doctors, and Baldus[c] in particular. The following tokens and evidences of reconciliation are listed:

[c] *On Code* III. xxxvi. 5.

(1) If the injured party takes no action for a year—since suit for injury is precluded by neglect and inaction for that length of time.[d]

[d] *Code*, IX. xxxv. 5; *Dig.* XLVII. x. 17, § 6, with comment in gloss; Felinus on *Decretals* II. xxv. 8, col. 6.

(2) If a person takes the matter to court and uses this means for the punishment of the injury, he will have foresworn all other redress —if such be available either through written law or by custom. So *Digest*, XLVII. x. 17, § 6, where, according to Jason,[e] we should add: 'unless it is specifically provided that any other available recourse be left unprejudiced'.

[e] *On Dig.* II. xiv. 1.

About such provision I am much in doubt, especially if the methods of punishment in question are not cumulative or concurrent (for, in such a case by chosing one recourse, it is counted that a man renounces his claim to the other); for what avail is there in a provision that does not accord with fact?[f]

[f] *Decretals*, II. xxviii. 54, at end; *Dig.* XIX. ii. 60, § 6; and Imolensis and all Doctors on *Dig.* XXXIX. i. 8, § 6, col. 3.

[1] [*revocare*; perhaps for *revocari*.—Tr.]

[2] [Ulpian.—Ed.]

(3) It is sure evidence of peace if the two people shake hands, this being a familiar symbol of friendly greeting. So Paolo di Castro and other Doctors on *Digest* II. xiv. 1, where they add the comment, that if an instrument reads 'Titius and Seius have come to an agreement in regard to their unfriendly relations',[1] it is understood that they have made peace. This I believe is true, in case the document is duly executed and contains nothing else (for otherwise 'agreement' might allow of various interpretations). Hence if there are no other words in the document, it would be better to interpret as above; whereas if other words are added, or the instrument was not duly executed, the case would be otherwise.

[a] *On Dig.* II. xiv. 1.

(4) If they drink in company; so Alexander.[a] This must be judged in the light of the circumstances. For if the men drink together by themselves at the same table, reconciliation is taken for granted—and much more, if they drink from the same cup. But if two enemies meet with many others at table (e.g. at a banquet), I should not think that the mere drinking together or fraternizing ought to be considered a sure indication of restored friendship.

[b] So Baldus, on *Dig.* XXVIII. ii. 23; and Alexander and Joannes of Imola, *ibid.*

(5) And if they salute one another, or (according to the fashion of the day) if they doff hat or cap to one another with bared head,[b] this is counted an evidence of friendship.

[c] Baldus, *On Code* III. xxxvi. 5.

(6) Much more is reconciliation and peace taken for granted, if they converse together, and still more if they render mutual services and courtesies to one another.[c]

[147][2] Whether it is to be counted that reconciliation has been made 127
by forgiveness of injury in a sacramental or penitential confession is a question treated by Bartolus[d] and all the post-glossators.[e] The general[3] verdict is that the injury is not regarded as condoned, but merely that ill-will is laid aside, together with any unseemly thirst for revenge.

[d] *On Dig.* II. xiv. 17, § 1; *Dig.* XLVII. x. 11, § 1, with Alexander also in *addit.*

[e] *On Dig.* II. xiv. 17, § 1.

And much less is it assumed that there is remission of whatever losses were incurred as a result of the injury. So Jason,[f] who says also that not even on the basis of peace made (and that, too, a peace embodied in an official document) is it counted that there is cancellation of the right to reclaim property which was open to the injured party for the recovery of goods seized or in any other way taken possession of unlawfully. He cites Alexander,[g] who rightly thus concludes and affirms, with argument at length.

[f] *On Dig.* II. xiv. 1, no. 10.

[g] *Consilia*, Bk. II, 168, beginning: *Requisitus ut breviter dicam*; already cited above at another point.

And the following points are to be noted on the subject of 128
duelling. For although the duel is frowned on by the law[h]—whence 129
Baldus[i] adds that challenging to a duel is a sort of madness inconsistent with all humanity and repugnant to all natural reason, and that it 130
should be a last recourse—as is developed at greater length by those

[h] *Decretum*, II. ii. 5. 22; *Decretals*, V. xiv. 2; V. xxxv. 2.

[i] *Consilia*, Bk. II. 343, beginning: *Illustris Domine.*

[1] [For *habebat* read *habebant*.—Tr.]
[2] [For p. **148** read p. **147**.—Tr.]
[3] [*cōiter*, i.e. *communiter*.—Tr].

who have written treatises on the subject (e.g. Giovanni de Legnano, Paris de Puteo, and lately Alciati), lest rules be lacking for an accursed institution, and in order that men may practice insanity with a system (though the comic poet[a] thought this impossible)—material which I have been unwilling to incorporate in this treatise, not wishing to weight it down and amplify it too much, and not to confound private feuds, which derive their inspiration straight from Hell, with public warfare, which is an outgrowth of the law of nations and allowed by divine law, and which has as its goal peace and the general good.

[a] [Terence, *The Eunuch*, 62 ff.]

These treatises, I say, make for the very cause of duelling, which[1] the perverse madness of men has developed into an institution. Hence
131 Baldus[b] said that duelling is not counted unlawful, because it has been evolved through general practice.

[b] *On Code* IV. xxxiv. 6, last words.

132 Yet, on the other hand, Baldus[c] states that, even when fought to vindicate innocence, the duel is very repugnant to the laws, because it makes trial of God, and because we see many perish thereby whose cause is just. Hence even in the Lombard law (the code under which duelling developed) it was a case of excusing a thing which was of necessity allowed; for, in view of the customs of the nation, duelling could not be prohibited. This is like what was said of divorce,[d] namely that from the beginning it was not so; but that it was tolerated because of the hardness[2] of heart of the Jews.

[c] On rubr. *Code*, VII. v, near end.

[d] *St. Matthew*, xix [8].

133 And what Baldus says of custom to me does not seem to excuse those who engage in duels; for no lapse of time serves [**147**] to legitimize a custom provocative of wrongdoing. For every law (even the unwritten laws, to which class belong the customs and practices of men) should be just, fair, and reasonable.

And what justice or reason is there in two men undertaking to determine by arms which is the more just, which the better, which the more innocent? There is no more logic in this than if two lawyers or two philosophers should cross swords to determine which was the more learned. Further, what is more unfair, what more unfitting than that an innocent man (and one who, as often happens, is handicapped in the matter of age and strength) should be pitted against some bold fellow, his superior in brute force?

But since the matter does not interest sovereigns, especially in this unfortunate and desolated Italy of ours (which a multitude of masters has made a tributary, nay, rather a slave, after being mistress of the world), let us at any rate, so far as we can, lop some branches from the accursed tree.

Well then, in view of the fact that associates and friends are apt playfully to bubble over,[3] and in sportiveness to say to one another

[1] [*quam*; perhaps a slip for *quod*.—Tr.]
[2] [*duriciem*, i.e. *duritiem*.—Tr.]
[3] [*effuciāt*, i.e. *effutiant*.—Tr.]

many a word without thought or serious intent, and to indulge in numerous other like actions—in case a person who feels himself insulted thereby does not at once give attention to them, he will thereafter have no right to challenge to a duel, nor to avenge the injury.

And far less will he have such right, if subsequently the parties concerned engage jointly in games, drinking, greeting, or conversation, or any other such-like act. In fact he will not have such right, even though the person who gave offence did so with intent and in anger; for none the less on that account will the above evidences make for reconciliation, and for a check upon challenging to a duel.

But, reader, rest assured of one thing. On the basis of no incon- 134
clusive evidence is it assumed that injury and offence are condoned in cases where a person has formally taken notice of the same. For, as I believe, the proofs must be genuine, applicable, and also unmistakable —not casual, inconclusive, and equivocal. For when a purpose and attitude of mind are once adopted, the presumption is that they continue, as Baldus said,[a] unless on conclusive evidence they are shown to have been changed.

[a] *On Code* III. xxxvi. 5.

For an equivocal demonstration, which lends itself to either view, 135
is of no weight.[b] There is a noteworthy and peculiar case in *Digest*, 136
XXVIII. ii. 23; for it is therein stated of a son whom his father has disinherited, emancipated, and finally adopted, that the fact of 137
adoption does not mean that the original offence is remitted or the disinheritance cancelled.

[b] *Code*, IV. xix. 10, with the common rules.

This seemed strange to Baldus and to every one else, to judge from their comments there; for in view of the fact that indications of renewed goodwill on the part of a father cancel disinheritance (as Bartolus[c] stated, on the basis of the laws he cites), who would not have thought that adoption is such an evidence?

[c] *On Dig.* XXXIV. iv. 3, § 11; and *Dig.* XXXIV. iv. 4.

In agreement with Baldus, Paolo di Castro[d] explains this difficulty by saying that, inasmuch as renunciations of control by the father did not furnish the basis for disinheritance, it is not strange that the resumption of that control does not have the opposite effect. This explanation does not solve the difficulty.

[d] *On Dig.* XXVIII. ii. 23.

[148] In the lecture of Paolo di Castro on this passage still another explanation is suggested, namely that the son in question is not counted as adopted, since he is a son by birth,—and in view of the fact that fiction gives way in the face of fact. Hence adoption reinstated him in the position he had previously held when emancipated; no wonder therefore that the disinheritance is not revoked under which he was then suffering. But not even this takes into account the presumptive reconciliation; for disinheritance is revoked by evidences of changed attitude, as Bartolus held.

Paolo himself (with Alexander following) offers the explanation

that the validity of the father's will is the key to the situation. For if the disinheritance were cancelled as a result of the adoption, it would mean that the son had been passed over [in the will], and the will would become invalid.[1] To me this seems very strange and incongruous —that the feeling which the testator has for the validity of his will should be stronger and more potent[2] than paternal affection.

Imola here[a] offers the explanation that the disinheritance holds because it was a formal matter, and it is not annulled in the will by a subsequent act that is less formal. In support of this he cites *Digest*, XXVIII. v. 21, § 1, but Alexander with reason dissents. For adoption, too, is a formal act; and even a formal will is revoked in favour of another less formal involving children only.[b]

[a] *Ibid.*

[b] *Code*, VI. xxiii. 21, § 3.

Perhaps the explanation which I gave above is the true one, namely that the token and evidence of subsequent relenting must be decisive and not equivocal; conclusive and not vague. Now his action in adoption[3] is equivocal, and to the son himself unfavourable and prejudicial. For he loses his freedom, and falls again under another's control; and it is conceivable that the father might have adopted him even while retaining his sense of injury, e.g.[4] that the son might more easily be disciplined.[5] (So, in turn, the fact of emancipation is favourable to a son in that through it he gains independence and many other advantages.)

[1] [The meaning apparently being that, the disinheritance clause being cancelled, the will becomes invalid because it fails either to disinherit the son or to mention him as a legal heir.—Ed.]

[2] [*efficatior*, i.e. *efficacior*.—Tr.]

[3] [For *adoptione* read *adoptionis*.—Tr.]

[4] [For *scillcet* read *scilicet*.—Tr.]

[5] [For *castigaret* read *castigaretur*; or for *filius* read *filium*.—Tr.]

[148′]

HERE BEGINS
THE ELEVENTH PART OF THE WORK

# SOLE CHAPTER

## ON HOSTAGES

## SYNOPSIS

1 What hostages are.
2 Hostages; whence the institution.
3 Women too are given as hostages.
4 Why hostages are given.
5 Hostages lose status.
6 The initial stage must be considered.
7 The more noble persons of the party giving security are selected as hostages.
8 Hostages are given by the inferior to the more worthy.
9 A free man may be given as a hostage.
10 A man who by the laws has the right to maintain a prison is not guilty of the act of private imprisonment.
11 Private citizens may not give hostages.
12 Hostages are given even in money dealings. But understand as here explained.
13 Cities may give hostages.
14 A private person may consent to be given under oath as a hostage.
15 The Pope gives a member of the clergy as a hostage.
16 It is different with a bishop, who will not give such a hostage.
17 An abbot may give one of his monks as a hostage.
18 However, a monk so given shall not be retained against his will.
19 A father cannot give a son as hostage.
20 Hostages may be given even against their will.
21 A sovereign and an independent people may lawfully deprive a subject of his property.
22 A member of the clergy may not be given as hostage against his will. But understand this as here explained.

[149] In view of the fact that hostages usually are associated with
1 peace, some remarks upon them are in order. Hostages are free men
2 given into the power of the other party as security for the keeping of compacts. This institution (like war, enslavement, and postliminy) is an outgrowth of the law of nations, according to Baldus.[a]

3 Moreover, not only men, but also women and girls are given as hostages, as shown by a passage in Livy,[b] wherein he relates that Cloelia and some other maidens were surrendered as hostages to Porsena by the Romans. But, crossing the Tiber[1] by swimming, they made their escape to Rome. And Tacitus[c] says of Tiridates, the Parthian, King of Armenia: 'meanwhile he surrendered his daughter as a hostage.'

4 For the most part hostages are given by enemies to secure a peace and compact made; or a surrender, or other[2] agreements and obligations. But they are given also between allies and confederates (to make the contracting parties more sure that agreements will be kept), as is indicated by a passage in the *Commentaries* of Caesar:[3][d] 'And since', says he, 'for the time being they could not take security from one another in the way of hostages not to betray the matter, they sealed the compact with an oath-bound promise'.

[a] *On Code* IV. xliii. 2, the words *numquid obsides*.

[b] [II. xiii. 4 ff.]

[c] *Annals*, XV [xxx].

[d] *Gallic War*, VII [ii].

[1] [For *Tiberii* read *Tiberi*.—Tr.]
[2] [For *aliæ vè* read *aliaeve*.—Tr.]
[3] [*Ces.*, i.e. *Caes(ar)*.—Tr.]

Under the Roman law, hostages lost status, and became the slaves 5
of those to whom they were surrendered, as is shown by regulations in
the *Digest*.[a] (At times, however, they regained the use of the toga, and
then they could make valid wills, and were in a sense free.[1b])

Now Baldus[c] raises the question why those of the enemy who are
surrendered as security after peace has now been made thus become
slaves. Angelus[d] offers an explanation by distinguishing as follows: (1)
They are surrendered by people who are enemies in the strict sense of
the word (such as are the Turks in their relations with us), and then
they are slaves; or (2) They are exchanged between people who are not
enemies in the strict sense of the term[2] (as when Christians are at war
with one another), and then they do not become slaves.

But this explanation does not solve the difficulty. And the same
is true of what Imolensis[e] (following Angelus) says, namely that the
reference is to hostages given by outside peoples, according to *Digest*,
XLIX. xv. 5, § 2; for this remark, in addition to the fact that it goes
no farther towards the solution of the difficulty, is erroneous as well.
For those cannot be called 'outside peoples' with whom we engage in
war and afterwards make a peace pact.[f]

A gloss on *Digest* XXVIII. i. 11 states that the reference is to
hostages given for the making of peace, or with reference to the keeping
of a peace already made. It is this last that prompts the query of
Baldus.

It might be answered that at the time when negotiations were in
progress [**149**'] as to terms and hostages, the persons in question were
still enemies; and that in this, as in many things, the initial stage is the 6
decisive factor.[g] (For the motive for giving hostages is not the pact or
the peace, but hostility and a fear that the terms will not be observed.)
Or, again, we might assume that this was a practice originally intro-
duced by custom, falling back upon *Digest*, I. iii. 20 and 21.

Again, it is customary to give as hostages the most distinguished 7
persons of the nation which supplies them. Thus we read in Tacitus[h]
how, during the reign of Tiberius, ambassadors from the Parthians
requested that Phraates, son of King Phraates, who had for some time
been held at Rome as a hostage, be given to them as king, to displace
Artabanus who was ruling barbarously in their country. So, too, in the
reign of Claudius[i] other ambassadors secured the return of Meherdates,
who also was of the Arsacid line, which was their royal family.

Further, hostages are usually given to the more worthy and power- 8
ful, and to those who are superior in dignity and strength. This is very
clearly shown by a passage in Caesar;[j] for when he had asked that hostages
be given him by the Helvetians, they replied that it had been their
practice from time immemorial to receive hostages, not to give them.

[a] *Dig.* XLVIII. xiv. 31; XXVIII. i. 8, at the beginning; and XXVIII. i. 11.
[b] *Dig.* XLIX. xiv. 32.
[c] *On Dig.* XXVIII. i. 11.
[d] *Ibid.*
[e] *Ibid.*
[f] *Ibid.*
[g] *Dig.* XLVIII. v. 24, § 1, with comment by Bartolus.
[h] [*Annals*, VI. xxxi. 4.]
[i] [Tacitus, *Annals*, XII. x. ff.]
[j] [*Gallic War*, I. xiv. 7.]

[1] [*liberum*, i.e. *liberorum*.—Tr.]
[2] [For *impropriae* read *improprie*.—Tr.]

9 The Doctors raise the question whether a free man may be surrendered as a hostage; and Panormitanus[a] distinguishes according as the person whose surrender is in question is a layman or a member of the clergy. In the first case:[1] (1) The man is surrendered by those who have the right to declare war, and then the surrender is valid; but the hostage loses status and becomes a slave. (This, however, must be understood of dealings between others than Christians; for since among them captives do not become slaves, much less will this happen to hostages); or (2) The surrender is arranged between parties of less authority, and then the transaction is not valid, the victim does not lose status, nor does he become a pawn either. For that too is a sort of slavery, and suggestive of private imprisonment—which is an abomination to the laws.

[a] *On Decretals* II. xxiv. 9.

In this last subdivision his treatment lacks precision and finish. For we ought to recognize a dividing line between rulers (even of
10 inferior rank) and all private persons whatsoever. For it cannot be said of a ruler, even lower than the highest, that his is a private prison, though he may maintain one that is arbitrary and vicious. And although rulers of this sort, not having the right to declare war (as was shown above), have not the right to give hostages either (this being contingent upon war and peace pacts), still it would be difficult to maintain that even they *can not* give them, in view of the fact that they arrogate to themselves many other rights not allowed by law. And this is the meaning of the remark of Bartolus[b] to the effect that the practice has sprung up of allowing one city to give hostages to another, though they do not lose status.

[b] *On Dig.* XXVIII. i. 11.

11 But among private citizens I think that, without exception, hostages cannot lawfully be given; and, if given—even with their own consent, I hold that they are not under any obligation; for, as Panormitanus said, this is a sort of imprisonment, to which no one may obligate himself, as the Doctors generally agree.[c]

[c] *On Dig.* XXX. lv; *Dig.* XXIV. iii. 14, § 1; *Dig.* XXXV. i. 71, § 2.

The above view finds support in what is said [**150**] in the passages cited, and in a gloss on *Decretum* II. xxiii. 8. 18, though the Doctors commonly quote the canon immediately preceding in support of the view that hostages are given for state reasons (e.g. to assure peace), but
12 not for financial security; for this last must be understood and interpreted as limited to the pecuniary interests of private parties, but not of sovereigns. For even in our times we have known Francis, King of the French, to give his sons as hostages for the interim, when he was released by the Emperor Charles under promise of a large sum of money, with payment deferred to a certain date.

13 And as for the claim above that a practice had sprung up of cities giving their people as hostages to other cities, this was justified

[1] [The other case is taken up below in another way; see no. 14, at end.—Tr.]

by Paulus on *Decretals* II. xxiv. 9,[a] as well as by Innocent;[b]—but for state reasons (e.g. to assure peace) and not for financial security, as was stated also by Imolensis[c] and Baldus.[d] For although such hostages will not be slaves, yet, says he, they will be in a sort of old-fashioned hostageship; and,[1] since this is a corollary of war (just like enslavement), the whole finds justification in the law of nations itself.

Again, as to my statement that the consent of a person who has 14
allowed himself to be given as a hostage in a private cause does not bind him, I believe that this is subject to the following qualification: unless he has put himself under oath. For in that case perhaps regard for the oath will hold him, even though the rule for hostages does not so operate. So we may gather from *Decretum* II. xxiii. 8. 18: ('lest in any particular your spirit or ours suffer trouble with respect to oaths'); and there is confirmation in the common rules as to an oath, which should be kept whenever this can be done without peril to salvation.[e]

However, Baldus[f] says that when hostages are given between private parties, they are not in pawn nor are they forced to be slaves, and yet, says he, they are retained by virtue of their consent; but they can be reclaimed to full liberty by their superior or even by their father; and they may also take such action themselves, if they have been given as hostages without their own consent. But in the cases of which he is speaking (i.e. between merely private citizens) I think that these points are not well taken, in view of what I have said above.

I have considered laymen; now I pass to the clergy, regarding whom Panormitanus[g] says that the Pope may lawfully give a member of 15
the clergy as a hostage, and that the man will be truly such. But, says he, the same does not hold true so far as a bishop is concerned, even if 16
the clergyman himself consents. For the latter will be at liberty to withdraw when he chooses, provided, however, that he has not given an oath-bound promise.

Furthermore, as he says there, it is permissible for an abbot, in the 17
interest of his monastery, to give a monk of his as hostage, even against the man's will; and the monk will be bound to remain in a definite place agreed upon, and will be kept there even against his will because of the abbot's assent.

But Baldus[h] claims that the monk cannot be held against his will; 18
and to this I agree. For if it is not permissible for a father to give his 19
son as hostage (as all the Doctors agree; see Baldus[i] here, and Ripa on *Digest* XX. i. 6,[j] where he discusses this subject), [**150**′] it can hardly be true that the power of the abbot over a monk is greater.

But when Ripa[k] states that hostages cannot be given, even for 20
adequate reasons, against their will, perhaps such a sweeping verdict is not sound. For suppose that nobody would consent to be given; will

[1] [Reading *quae* for *quia*.—Tr.]

[a] Last col. but one, the words *ego credo*.
[b] *Ibid.*
[c] *On Dig.* XXVIII. i. 11.
[d] *On Code* IV. xliii. 2, the words *ulterius numquid obsides*.
[e] *Sext*, I. xviii. 2.
[f] *On Code* IV. xliii. 2.
[g] *On Decretals* II. xxiv. 9.
[h] *On Code* IV. xliii. 2.
[i] *Ibid.*
[j] no. 14.
[k] *Ibid.*, no. 12, at end, the words *id etiam quod ex publica causa*.

not[1] peace and the public welfare suffer? It is better, therefore, to assume that those are given, even though they be unwilling and reluctant, whom the people[2] (presupposing its authority)[3] or the sovereign shall have chosen. There is confirmation for this in the text and subject-matter of *Digest* XXI. ii. 11, with the comments by Angelus and others on *Digest* II. xiv. 5, and by Angelus again on *Digest*, VIII. iv.
21 13, § 1. And Alexander[a] and Decio[b] argue at length the principle that it is permissible for a free state or a sovereign, in the interest of the public welfare, to deprive an individual citizen of his property.

[a] *Consilia*, Bk. II, 190.
[b] *Consilium* 520, cols. 1 and 2.

22 In regard to the clergy, however, Panormitanus says that they may not be given as hostages against their will; and that he who retains one of them against his will would fall under the penalty of *Decretum*, II. xvii. 4. 29. This, too, I think is not true, in case the man was selected by the Pope. For it would be assumed that he had granted the party receiving the hostage a dispensation covering the penalty of the canon cited. This topic I do not pursue further.

And herewith I make an end of my treatise. If any good thing has been said therein, it should be credited to the Creator of man and of knowledge. Whatever is incorrect or imperfect may well be ascribed[4] to the fallibility[5] and limited powers of the author, who will lend a ready ear to those who have corrections and improvements to suggest.

[1] [For *non ne* read *nonne*.—Tr.]
[2] [For *populos* read *populus*.—Tr.]
[3] [For *auctorita e* read *auctoritate*.—Tr.]
[4] [*egre*, i.e. *aegre*.—Tr.]
[5] [For *imbecilitatem* read *imbecillitate*.—Tr.]

THE END

VENICE: BY FRANCISCUS DE PORTONARIIS,

IN THE YEAR OF OUR LORD MDLXIII.

THE EIGHTH OF MAY.

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